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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 770.

BENJAMIN GITLOW, PLAINTIFF IN ERROR,

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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**Notice.**

**Supreme Court of the United States**

BENJAMIN GITLOW,  
Plaintiff-in-Error,

against

PEOPLE OF THE STATE OF NEW  
YORK,  
Defendants-in-Error.

2

*Sirs:*

PLEASE TAKE NOTICE that pursuant to a direction of Mr. Justice Brandeis referring an application for writ of error in the above case to the full Court of the United States Supreme Court, the annexed petition and supplemental petition for writ of error, assignment of errors and accompanying papers, together with a certified transcript of the record of this cause, including the remittitur of the New York Court of Appeals and amendment thereof on file in the office of the County Clerk, New York County, will be presented to the Supreme Court of the United States at its court room in the Capitol, Washington, D. C., on the 13th day of November, 1922, at the opening of court on that

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*Notice.*

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day or as soon thereafter as the same will be received.

Dated, New York, October 30, 1922.

Yours, etc.,

WALTER NELLES,  
Attorney for Benjamin Gitlow,  
Petitioner for Writ of Error,  
80 East 11th Street,  
New York City.

5 To:

CHARLES D. NEWTON, Esq.,  
Attorney General of the  
State of New York.

JOAB H. BANTON, Esq.,  
District Attorney,  
New York County.

**Supplemental Petition for Writ of  
Error.**

**SUPREME COURT  
OF THE UNITED STATES.**

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BENJAMIN GITLOW, Plaintiff-in-Error,  against  PEOPLE OF THE STATE OF NEW YORK, Defendants-in-Error.	}
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8

Now comes Benjamin Gitlow, defendant below, by Walter Nelles, his attorney, and makes the following allegations supplemental to his petition for a writ of error dated July 22, 1922, which was referred by Mr. Justice Brandeis to the full court on the 19th day of August, 1922.

On submission of the original application for writ of error Mr. Justice Brandeis questioned whether the remittitur showed with sufficient certainty that the federal questions under the 14th Amendment to the Constitution of the United States were before the Court of Appeals of the State of New York in this case. A motion was therefore made in the Court of Appeals on the first day of the first term of that court next ensuing (October 2, 1922) for the amendment of the remittitur, and this motion was granted on the 10th day of October, 1922, and the remittitur

9

10      *Supplemental Petition for Writ of Error.*

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amended by direction of that court by the insertion therein of the following statement:

"The question whether the New York Criminal Anarchy Law (Penal Law, Sections 160-161) and its application in this case is repugnant to the provision of the 14th Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, was considered and passed upon by this court."

- 11      The record of the trial in this cause was also, on August 11, 1922, on consent of the District Attorney of New York County, amended to show that defendant's counsel upon the trial did in fact specifically raise the constitutional questions under the 14th Amendment to the Constitution of the United States.

- On the trial of this cause the defendant avowed full responsibility for the publication of the Manifesto set forth in the indictment (Certified Remittitur, fols. 75-83); and it was undisputed that the periodical known as The Revolutionary Age and the issue thereof dated July 5, 1919, containing the said Manifesto, was published on behalf of
- 12      an organization known as the Left Wing of the Socialist Party; that the defendant was a member of said organization and of its directing group known as "The National Council," and personally advocated its principles; that he was business manager of The Revolutionary Age; that he de-

livered the manuscript of the Manifesto to the printer for printing in said July 5th issue of The Revolutionary Age, and that copies of said issue were purchased in his office in New York City.

There was no evidence as to any effect resulting from or following the publication and circulation of this Manifesto.

The parts of the record in this cause which it may be material for this court to examine are as follows:

(1) The indictment, counts 1 and 2, and endorsement, a copy of which is hereto annexed. A 14  
third count in the indictment charging the same acts as a misdemeanor was withdrawn at the trial. It is therefore not included.

(2) The first objection to evidence made by defendant's counsel at the opening of the trial, reported in the record in the following language:

"Mr. Darrow: Before taking the testimony, I want to object to all evidence under this indictment, first on the ground that the article set out shows as a matter of law that it is not in contravention of the statute, and secondly that the statute is in contravention of the State Constitution, Article , Section 15  
Article , and of the Federal Constitution, Article , Section . I will give you the exact references, if you will permit me, sometime during the day" (Certified Remittitur, fols. 72-73).

16      *Supplemental Petition for Writ of Error.*

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(3) The order of the Supreme Court, New York County, filed August 11, 1922, providing as follows:

"On reading and filing the annexed consent, it is ordered that the record of the trial in the above entitled cause, be, and the same hereby is, amended so as to include after the word, 'day' on the ninth line of folio 73 on page 25 of the printed case on appeal now on file herein, the following:

17      "The references are as follows: as to the State constitution, Section 8 of Article I thereof; as to the Federal Constitution, that portion of Section I of the 14th Amendment which provides that no State shall deprive any person of life, liberty or property, without due process of law.'"

(4) The motion for dismissal of the indictment and direction of a verdict of acquittal made by defendant's counsel at the close of the evidence, which were as follows:

"Mr. Rorke: The People rest.

18      Mr. Darrow: We rest. I want to make the usual motion to the court to instruct the jury to return a verdict of not guilty in this case.

The Court: Motion denied.

Mr. Darrow: Based on the grounds stated in the first objection to evidence in this case.

The Court: Motion denied.

Mr. Darrow: Exception. I want to make a motion that the court dismiss the indictment, upon the grounds heretofore stated, that the indictment does not charge an offense, and also upon the ground that the evidence in this case does not show an offense, and I further ask the court to direct an acquittal in this case.

The Court: Motion denied.

Mr. Darrow: Exception" (Certified Remittitur, fols. 796-797).

(5) The motions made by defendant's counsel in arrest of judgment, which were as follows: 20

"Mr. Recht: The defendant moves to set aside the verdict and for a new trial on the grounds that serious and prejudicial errors of law have been committed through the trial, that the indictment fails to set out a crime; that the section under which the defendant has been indicted is unconstitutional and void and on all the constitutional grounds set out in the Code of Criminal Procedure.

Defendant also moves an arrest of judgment on all the grounds previously stated \* \* \*.

The Court: Both motions are denied.

Mr. Recht: Exception" (Certified Remittitur, fols. 1283-1285). 21

(6) The defendant's second and third requests to charge, which were as follows:

"2. Advocating, advising or teaching the duty, necessity or propriety of overthrowing



organized government by force or violence, or by any unlawful means, within the meaning of the criminal anarchy law, means the advocacy, teaching or advising, or the publication of articles advising, teaching or advocating some definite and immediate act or acts of force or violence, or of other definite and immediate unlawful acts directed toward the overthrowing of organized government.

3. Any person, under the laws of the State of New York, has the right to advocate the complete change of the structure and policies of government, or to advocate the abolition of all government, unless that advocacy includes also the teaching or advising of the duty, necessity or propriety of doing some immediate and definite act or acts which constitute force, violence, or other unlawful means" (Certified Remittitur, fols. 1237-1239).

The part of the charge of the court relating thereto, which was as follows:

"If, on the other hand, as reasonable men, you are satisfied beyond a reasonable doubt that the purpose and intent of that article was to advise, teach and advocate, and that it did advise, teach and advocate the duty, necessity or the propriety of overthrowing organized government by means contrary to the laws of this government, or by means of force or violence, then it is equally your duty to find the defendant guilty. It is not necessary nor should it be expected, that person who

should advocate, who did advocate or advise or teach the overthrow of the government by force or violence or by unlawful means should point out with particularity the exact method of force and violence that he intended to use, or the exact time when he intended to put his purpose into effect, any more than a person who announces or makes the determinations in his own mind of a purpose to commit murder should warn his victim of the time and place and method by which the murder was to be committed. That is not to be expected.

I decline to charge request number two further than I have charged. I decline to charge request number three, further than I have charged" (Certified Remittitur, fols. 1191-1193).

26

The exception of the defendant's counsel to these and all other refusals and modifications of requested charges, which were as follows:

"Mr. Darrow: I want to take an exception to the language of the Court that it is not necessary that any writing or speaking should point out the exact method that the thing should be accomplished, or the time, and coupled with that suggestion, the language of the Court and its illustration that you could as well expect that a murderer would tell his victim when and how he was going to kill him.

27

We have already an exception to the special requests you refused and the modifications, where they are modified?

The Court: Certainly" (Certified Remittitur, fols. 1228-1229).

(7) The defendant's eighth and ninth requests to charge, which, with the Court's comment and rulings upon said requests, were as follows:

29 "8. Unless you find that the defendant intentionally put into writing language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, within the object of overthrowing organized government, you must find the defendant not guilty under the first count of the indictment.

9. Unless you find that the defendant intentionally published or issued, or circulated with knowledge of the nature of the publication, language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the second count of the indictment" (Certified Remittitur, fols. 1241-1242).

30 "I decline to charge that as requested, because of the uncertainty and indefiniteness of the language. 'Put into writing.' He may be equally responsible if he never touched a pencil or pen to paper. I also refuse to charge it because it says 'language calculated to incite certain persons.' It makes no difference whether the language was calculated to in-

cite, if the language did advise, advocate and teach the doctrine. If a man tries to do it and his powers of expression are not such as will incite the person to whom he addresses his remarks, that is not his fault. He commits a crime when he advises it. If it is the purpose of the request that the defendant must have done it intentionally, I charge that if he accidentally advocated, advised or taught a doctrine, that would not be a crime. And as to the intent of the act, of the speech, or of the writing—when I say writing, it includes printing—I charge that unless you find that the defendant intentionally advised, advocated or taught by writing, the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by unlawful means, you must find the defendant not guilty under the first count. I refuse to charge the ninth request as requested" (Certified Remittitur, fols. 1195-1197).

32

(8) The order of affirmance of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, a copy of which is hereto annexed.

(9) The opinion of the Appellate Division (reported 195 App. Div., 773), a copy of which is hereto annexed.

33

(10) Judgment of affirmance by the Court of Appeals of the State of New York a copy of which is hereto annexed.

34      *Supplemental Petition for Writ of Error.*

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(11) The opinions rendered in the Court of Appeals (reported 234 N. Y., 131), copies of which are hereto annexed.

(12) The order of the Supreme Court, New York County, upon the remittitur of the Court of Appeals, a copy of which is hereto annexed.

(13) The order of the Court of Appeals amending the remittitur, a copy of which is hereto annexed.

Your petitioner is now confined in State's Prison pursuant to his sentence herein.

35      Your petitioner renews the prayer of the petition herein dated July 22, 1922, that a writ of error may issue in his behalf out of the Supreme Court of the United States for the correction of the errors complained of and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that said writ of error may be supersedeas and that your petitioner be released on bail pending the final disposition of said writ of error.

Dated, New York, October 30, 1922.

36

BENJAMIN GITLOW,  
Petitioner.

By WALTER NELLES,  
His Attorney,  
80 East 11th Street,  
New York City.

**Indictment.**

37

(Certified Remittitur, fols. 7-21b; 245-359.)

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

PEOPLE OF THE STATE OF  
NEW YORK,

against

.....,

.....,

JAMES LARKIN, CHARLES E.  
RUTHENBERG, BENJAMIN GIT-  
LOW, ISAAC E. FERGUSON, and  
.....,

Defendants.

38

THE GRAND JURY OF THE COUNTY OF NEW YORK,  
by this indictment, accuse THE SAID DEFENDANTS  
of the Crime of CRIMINAL ANARCHY, committed  
as follows:

The said defendants, all in the County of New  
York aforesaid, on or about the fifth day of July,  
in the year of our Lord one thousand nine hundred  
nineteen, but on what particular day the Grand  
Jury aforesaid is unable more particularly to set  
forth, feloniously did advocate, advise and teach  
the duty, necessity and propriety of overthrowing  
and overturning organized government by force,

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violence and unlawful means by certain writings then and there procured, prepared and composed by the said defendants and by them circulated and distributed, among divers people to the Grand Jury aforesaid unknown in the County of New York aforesaid, and 'which said writings were then and there as follows, that is to say:

**"THE LEFT WING MANIFESTO.**

Issued on Authority of the Conference, by the  
National Council of the Left Wing.

41

The world is in crisis, Capitalism, the prevailing system of society, is the process of disintegration and collapse. Out of its vitals is developing a new social order the system of Communist Socialist; and the struggle between this new social order and the old is not the fundamental problem of international politics.

"The predatory 'war for democracy' dominated the world. But now it is the revolutionary proletariat in action that dominates, conquering power in some nations, mobilizing to conquer power in others, and calling upon 'the proletariat of all nations to prepare for the final struggle against Capitalism.

12

"But Socialism itself is in crisis. Events are revolutionizing Capitalism and Socialism—an indication that this is the historic epoch of the proletarian revolution. Imperialism is the final stage of Capitalism; and Imperialism means sterner reaction and new wars of conquest—unless the revo-

lutionary proletariat acts for Socialism. Capitalism cannot reform itself; it cannot be reformed. Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. There can be only the Socialism which unites the proletariat of the whole world in the general struggle against the desperately, destructive Imperialisms—the Imperialisms which array themselves as a single force against the onswEEPing proletarian revolution.

The prevailing conditions, in the world of Capitalism and of Socialism, are a direct product of the war; and the war was itself a direct product of Imperialism. 44

Industrial development under the profit system of Capitalism is based upon the accumulation of capital, which depends upon the expropriation of values produced by the workers. This accumulation of capital promotes, and is itself promoted by, the concentration of industry. The competitive struggle compels each capitalist to secure the most efficient means of production or a group of capitalists to combine their capital in order to produce more efficiency. This process of concentration of industry and the accumulation of capital, while a product of competition, ultimately denies and ends competition. The concentration of industry and of capital develops monopoly. 45

Monopoly expresses itself through dictatorial control exercised by finance capital over industry; and finance-capital unifies Capitalism for world-



exploitation. Under Imperialism, the banks, whose control is centralized in a clique of financial magnates, dominate the whole of industry directly, purely upon the basis of investment exploitation, and not for purposes of social production. The concentration of industry implies that, to a large extent, industry within the nation has reached its maturity, is unable to absorb all the surplus capital that comes from the profits of industry. Capitalism, accordingly, must find means outside of the nation for the absorption of this surplus. The older export trade was dominated by the export of consumable goods. American exports, particularly, except for the war period have been largely of cotton, foodstuffs, and raw materials. Under the conditions of Imperialism it is capital which is exported, as by the use of concessions in backward territory to build railroads, or to start native factories, as in India, or to develop oil fields, as in Mexico. This means an export of locomotives, heavy machinery, in short, predominantly a trade in iron goods. This export of capital, together with the struggle to monopolize the world's sources of raw materials and to control undeveloped territory, produces Imperialism.

A fully developed capitalist nation is compelled to accept Imperialism. Each nation seeks markets for the absorption of its surplus capital. Undeveloped territory possessing sources of raw material, the industry development of which will require the investment of capital and the purchase of machinery, becomes the objective of capitalistic competition between the imperialistic nations.

Capitalism, in the epoch of Imperialism, comes to rely for its 'prosperity' and supremacy upon the exploitation and enslavement of colonial peoples, either in colonies 'spheres of influence,' 'protectorates,' or 'mandatories,'—savagely oppressing hundreds of millions of subject peoples in order to assure high profit and interest rates for a few million people in the favored nations.

This struggle for undeveloped territory, raw materials, and investment markets, is carried on 'peacefully' between groups of international finance-capital by means of 'agreements,' and between the nations by means of diplomacy; but a crisis comes, the competition becomes irreconcilable, antagonisms cannot be solved peacefully, and the nations resort to war. 50

The antagonisms between the European nations were antagonisms as to who should control undeveloped territory sources of raw materials, and the investment markets of the world. The inevitable consequence was war. The issue being world power, other nations, including the United States, were dragged in. The United States, while having no direct concern since the issue was world power; and its Capitalism, having attained a position of financial world power, had a direct imperialistic interest at stake.

The imperialistic character of the war is climaxed by an imperialistic peace—a peace that strikes directly at the peace and liberty of the world, which organizes the great imperialistic powers into a sort of 'trust of nations,' among whom the world is divided financially and territorially. The 51

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League of Nations is simply the screen for this division of the world, an instrument for the joint domination of the world by a particular group of Imperialism. While this division of the world solves, for the moment, the problems of power that produced the war, the solution is temporary, since the Imperialism of one nation can prosper only by limiting the economic opportunity of another nation. New problems of power must necessarily arise, producing new antagonisms, new wars or aggression and conquest—unless the revolutionary proletariat conquers in the struggle for Socialism.

The concentration of industry produces monopoly. In Imperialism there is implied the socialism of industry, the material basis of Socialism. Production, moreover, becomes international, and the limits of the nation of national production, become a fetter upon the forces of production. The development of Capitalism produces world economic problems that break down the old order. The forces of production revolt against the fetters Capitalism imposes upon production. The answer of Capitalism is war; the answer of the proletariat is the Social Revolution and Socialism.

#### THE COLLAPSE OF THE INTERNATIONAL.

In 1912, at the time of the first Balkan war, Europe was on the verge of a general imperialistic war. A Socialist International Congress was convened at Basle to act on the impending crisis. The resolution adopted stigmatized the coming war as imperialistic and as unjustifiable on any pretext of

national interest. The Basle resolution declared:

1. That the war would create an economic and political crisis. 2. That the workers would look upon participation in the war as a crime, which would arouse 'indignation and revulsion' among the masses. 3. That the crisis and the psychological condition of the workers would create a situation that Socialism should use 'to rouse the masses and hasten the downfall of Capitalism.' 4. That the governments 'fear a proletarian revolution' and should remember the Paris Commune and the revolution in Russia in 1905, that is, a civil war.

The Basle resolution indicated the coming war as imperialistic, a war necessarily to be opposed by Socialism, which should use the opportunity of war to wage the revolutionary struggle against Capitalism. The policy of Socialism was comprised in the struggle to transform the imperialistic war into a civil war of the oppressed against the oppressor, and for Socialism.

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The war that came in 1914 was the same imperialistic war that might have come in 1912, or at the time of the Agadir crisis. But, upon the declaration of war, the dominant Socialism, contrary to the Basle resolution, accepted and justified the war.

Great demonstrations were held. The governments and war were denounced. But, immediately upon the declaration of war, there was a change of front. The war credits were voted by Socialists in the parliaments. The dominant Socialism favored the war; a small minority adopted a policy of petty bourgeois pacifism; and only the Left Wing groups adhered to the policy of revolutionary Socialism.

57

It was not alone a problem of preventing the war. The fact that Socialism could not prevent the war was not a justification for accepting and idealizing the war. Nor was it a problem of immediate revolution. The Basle Manifesto simply required opposition to the war and the fight to develop out of its circumstances the revolutionary struggle of the proletariat against the war and Capitalism.

59 The dominant Socialism, in accepting and justifying the war, abandoned the class struggle and betrayed Socialism. The class struggle is the heart of Socialism. Without strict conformity to the class struggle, in its revolutionary implications, Socialism becomes either sheer Utopianism, or a method of reaction. But the dominant Socialism accepted 'civil peace' the 'unity of all the classes and parties' in order to wage successfully the imperialistic war. The dominant Socialism united with the Governments against Socialism and the proletariat.

60 The class struggle comes to a climax during war. National struggles are a form of expression of the class struggle, whether they are revolutionary wars for liberation or imperialistic wars for 'spoliation. It is precisely during a war that material conditions provide the opportunity for waging the class struggle to a conclusion for the conquest of power. The war was a war for world power—a war of the capitalist class against the working class, since world power means power over the proletariat.

But the dominant Socialism accepted the war as a war for democracy—as if democracy under the conditions of Imperialism is not directly counter-

revolutionary. It justifies the war as a war for national independence—as if Imperialism is not necessarily determined upon annihilating the independence of nations. Nationalism, social patriotism, and social Imperialism determined the policy of the dominant Socialism, and not the proletarian class struggle and Socialism. The coming of Socialism was made dependent upon the predatory war and Imperialism, upon the international proletariat cutting each other's throats in the struggles of the ruling class.

The Second International on the whole merged in the opposed imperialistic ranks. This collapse of the International was not an accident, not simply an expression of the betrayal by individuals. It was the inevitable consequence of the whole tendency and policy of the dominant Socialism as an organized movement. 62

#### MODERATE SOCIALISM.

The Socialism which developed as an organized movement after the collapse of the revolutionary First International was moderate, petty bourgeois Socialism. It was a Socialism adapting itself to the conditions of national development, abandoning in practice the militant idea of revolutionizing the old world. 63

This moderate Socialism initiated the era of 'constructive' social reforms. It accepted the bourgeois state as the basis of its activity and strengthened that state. Its goal became 'constructive reforms,' and cabinet portfolios—the 'co-operation of classes'

64

the policy of openly or tacitly declaring that the coming of Socialism was the concern 'of all the classes,' instead of emphasizing the Marzian policy that the construction of the Socialist system is the task of the revolutionary proletariat alone. In accepting social-reformism, the 'co-operation of classes,' and the bourgeois parliamentary state as the basis of its action moderate Socialism was prepared to share responsibility with the bourgeoisie in the control of the capital state, even to the extent of defending the bourgeoisie against the working class and its revolutionary mass movements.

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The counter-revolutionary tendency of the dominant Socialism finally reveals itself in open war against Socialism during the proletarian revolution as in Russia, Germany and Austria-Hungary.

The dominant moderate Socialism was initiated by the formation of the Social-Democratic Party in Germany. This party united on the basis of the Gotha Program, in which fundamental revolutionary Socialism was abandoned. It evaded completely the task of the conquest of power, which Marx, in his Criticism of the Gotha Program, characterized as follows: 'Between the capitalistic society and the communistic, lies the period of the revolutionary transformation of the one into the other. This corresponds to a political transition period, in which the state cannot be anything else than the revolutionary dictatorship of the proletariat.'

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Evading the actual problems of the revolutionary struggle, the dominant Socialism of the Second International developed into a peaceful movement of organization or trades union struggles of co-

operation with the middle class, of legislation and bourgeois. State Capitalism as means of introducing Socialism.

There was a joint movement that affected the thought and practice of Socialism; on the one hand, the organization of the skilled workers into trade unions, which secured certain concessions and became a semi-privileged caste; and, on the other, the decay of the class of small producers, crushed under the iron tread of the concentration of industry and the accumulation of capital. As one moved upward, and the other downward, they met, formed a juncture, and united to use the state to improve their conditions. The dominant Socialism expressed this unity, developing a policy of legislative reforms and State Capitalism, making the revolutionary class struggle a parliamentary process.

68

This development meant, obviously, the abandonment of fundamental Socialism. It meant working on the basis of the bourgeois parliamentary state, instead of the struggle to destroy that state; it meant the 'co-operation of classes' for State Capitalism, instead of the uncompromising proletarian struggle for the Socialism. Government ownership, the objective of the middle class, was the policy of moderate Socialism. Instead of the revolutionary theory of the necessity of conquering Capitalism, the official theory and practice was now that of modifying Capitalism, of a gradual peaceful 'growing into' Socialism by means of legislative reforms. In the words of Jean Jaures, 'we shall carry on our reform work to a complete transformation of the existing order.'

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But Imperialism exposed the final futility of this policy. Imperialism unites the non-proletarian classes, by means of State Capitalism, for international conquest and spoilation. The small capitalists, middle class and the aristocracy of labor, which previously acted against concentrated industry, now compromise and united with concentrated industry and finance-capitalism and Imperialism. The small capitalists accept the domination of finance-capital, being allowed to participate in the adventures and the fabulous profits of Imperialism, upon which now depends the whole of trade and industry; the middle class invests in monopolistic enterprises, and income class whose income depends upon finance-capital, its members securing 'positions of superintendence' its technicians and intellectuals being exported to undeveloped lands in process of development; while the workers or the privileged unions are assured steady employment and comparatively high wages through the profits that come from the savage exploitation of colonial peoples. All these non-proletarian social groups accept Imperialism, their 'liberal and progressive' ideas becoming factors in the promotion of Imperialism, manufacturing the democratic ideology of Imperialism with which to seduce the masses. Imperialism requires the centralized state, capable of uniting all the forces of capital, of unifying the industrial process through state control and regulation of maintaining 'class peace' of mobilizing the whole national power, in the struggles of Imperialism. State Capitalism is the form of expression of imperialism—precisely that State Capitalism promoted by moderate, petty bourgeois Socialism.

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What the parliamentary policy of the dominant moderate Socialism accomplished was to buttress the capitalistic state, to promote State Capitalism—to strengthen Imperialism.

The dominant Socialism was part and parcel of the national liberal movement—but this movement, under the compulsion of events, merged in Imperialism. The dominant Socialism accepted capitalistic democracy as the basis for the realization of Socialism—but this democracy merges in Imperialism. The world war was waged by means of this democracy. The dominant Socialism based itself upon the middle class and the aristocracy of labor—but these have compromised with Imperialism, being bribed by a 'share' in the spoils of Imperialism. Upon the declaration of war, accordingly, the dominant moderate Socialism accepted the war and united with the imperialistic state.

74

Upon the advent of Imperialism, Capitalism emerged in a new epoch—an epoch requiring new and more aggressive proletarian tactics. Tactical differences in the Socialist movement almost immediately came to a head. The concentration of parliaments to the imperialistic mandates and the transfer of their vital functions to the executive organ of government, developed the concept of industrial unionism in the United States and the concept of mass action in Europe. The struggle the dominant moderate Socialism became a struggle against its perversion of parliamentarism against its conception of the State against its alliance with non-proletarian social groups, and against its acceptance of State Capitalism. Imperialism made mandatory a reconstruction of the Socialist move-

75

ment, the formulation of a practice in accord with its revolutionary fundamentals. But the representatives of moderate Socialism refused to broaden their tactics to adapt themselves to the new conditions. The consequence was a miserable collapse under the test of the war and the proletarian revolution—the betrayal of Socialism and the proletariat.

#### THE PROLETARIAN REVOLUTION.

77 The dominant Socialism justified its acceptance of the war on the plea that a revolution did not materialize, that the masses abandoned Socialism.

This was conscious subterfuge. When the economic and political crisis did develop potential revolutionary action in the proletariat, the dominant Socialism immediately assumed an attitude against the Revolution. The proletariat was urged not to make a revolution. The dominant Socialism united with the capitalist governments to prevent a revolution.

78 The Russian Revolution was the first act of the proletariat against the war and Imperialism. But while the masses made the Revolution in Russia, the bourgeoisie usurped power and organized the regulation bourgeois-parliamentary republic. This was the first stage of the Revolution. Against this bourgeois republic organized the forces of the proletarian Revolution. Moderate Socialism in Russia, represented by the Mensheviki and the Social Revolutionists, acted against the proletarian revolution. It united with the Cadets, the party of bourgeois Imperialism, in a coalition government of bourgeois democracy. It placed its faith in the war

'against German militarism,' in national ideals, in parliamentary democracy and the 'co-operation of classes.'

But the proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of 'all power to the Soviets'—organizing the new transitional state of proletarian dictatorship. Moderate Socialism, even after its theory that a proletarian revolution was impossible had been shattered by life itself, acted against the proletarian revolution and mobilized the counter-revolutionary forces against the Soviet Republic—assisted by the moderate Socialism of Germany and the Allies. 80

Apologists maintained that the attitude of moderate Socialism in Russia was determined not by a fundamental policy, but by its conception that Russia not being a fully developed capitalist country, it was premature to make a proletarian revolution and historically impossible to realize Socialism.

This was a typical nationalistic attitude, since the proletarian revolution in Russia could not persist as a national revolution, but was compelled by its very condition to struggle for the international revolution of the proletariat, the war having initiated the epoch of the proletarian revolution. 81

The revolution in Germany decided the controversy. The first revolution was made by the masses, against the protests of the dominant moderate Socialism, represented by the Social-Democratic Party. As in Russia, the first stage of the Revolution realized a bourgeois parliamentary republic,

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with power in the hands of the Social-Democratic Party. Against this bourgeois republic organized a new revolution the proletarian revolution directed by the Spartacan-Communists. And, precisely as in Russia, the dominant moderate Socialism opposed the proletarian revolution, opposed all power to the Soviets, accepted parliamentary democracy and repudiated proletarian dictatorship.

83

The issue in Germany could not be obscured. Germany was a fully developed industrial nation, its economic conditions mature for the introduction of Socialism. In spite of dissimilar economic conditions in Germany and Russia the dominant moderate Socialism pursued a similar counter-revolutionary policy, and revolutionary Socialism a common policy, indicating the international character of the revolutionary proletarian tactics.

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There is, accordingly, a common policy that characterizes moderate Socialism, and that is its conception of the state. Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism; accordingly it conceived the task of the revolution, in Germany and Russia, to be the construction of the democratic parliamentary state, after which the process of introducing Socialism by legislative reform measures could be initiated. Out of this conception of the state developed the counter-revolutionary policy of moderate Socialism.

Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state and construct a new state of the organized pro-

ducers, which still deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat.

The proletariat revolution in action has conclusively proven that moderate Socialism is incapable of realizing the objectives of Socialism. Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletariat dictatorship.

#### AMERICAN SOCIALISM.

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The upsurge of revolutionary Socialism in the American Socialist Party, expressed in the Left Wing, is not a product simply of European conditions. It is, in a fundamental sense, the produce of the experience of the American government—the Left Wing tendency in the Party having been invigorated by the experience of the proletarian revolutions in Europe.

The dominant moderate Socialism of the International was equally the Socialism of the American Socialist Party.

The policy of moderate Socialism in the Socialist Party comprised its policy in an attack upon the large capitalists, the trusts, maintaining that all other divisions in society—including the lesser capitalists and the middle class, the petite bourgeoisie—are material for the Socialist struggle against Capitalism. The moderate Socialism dominant in the Socialist Party asserted, in substance: Socialism is a struggle for all the people against the trusts and big capital, making the realization of

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the Socialism depend upon the unity of 'the people,' of the workers, the small capitalists, the small investors, the professions—in short, the official Socialist Party actually depended upon the petite bourgeoisie for the realization of Socialism.

The concentration of industry in the United States gradually eliminated the small producers, which initiated the movement for government ownership of industry—and for other reforms proposed to check the power of the plutocracy; and his bourgeois policy was the animating impulse of the practice of the Socialist Party.

89 This party, moreover, developed into an expression of the unions of the aristocracy of labor—of the A. F. of L. The party refused to engage in the struggle against the reactionary unions, to organize a new labor movement of the militant proletariat.

While the concentration of industry and social developments generally conservatized the skilled workers, it developed the typical proletariat of unskilled labor, massed in the basic industries. This proletariat, expropriated of all property, denied access to the A. F. of L. unions, required a labor movement of its own. This impulse produced the concept of industrial unionism, and the I. W. W. But the dominant moderate Socialism rejected industrial unionism, and openly or covertly acted against the I. W. W.

90 Revolutionary industrial unionism, moreover, was a recognition of the fact that extra-parliamentary action was necessary to accomplish the revolution, that the political state should be destroyed and a new proletarian state of the organized producers constructed in order to realize Socialism.

But the Socialist Party not only repudiated the form of industrial unionism, it still more emphatically repudiated its revolutionary political implications, clinging to petty bourgeois parliamentarism and reformism.

United with the aristocracy of labor and the middle class, the dominant Socialism in the Socialist Party necessarily developed all the evils of the dominant Socialism of Europe—and, particularly, abandoning the immediate revolutionary task of reconstructing unionism on the basis of which alone a militant mass Socialism could emerge.

It stultified working class political action, by limiting political action to elections and participation in legislative reform activity. In every single case where the Socialist Party has elected public officials they have pursued a consistent petty bourgeois policy, abandoning Socialism.

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This was the official policy of the Party. Its representatives were petty bourgeois, moderate, hesitant, oblivious of the class struggle in its fundamental political and industrial implications. But the compulsion of life itself drew more and more proletarian masses in the party, who required simply the opportunity to initiate a revolutionary proletarian policy.

The war and the proletarian revolution in Russia provided the opportunity. The Socialist Party under the impulse of its membership adopted a militant declaration against the war. But the officials of the party sabotaged this declaration. The official policy of the party on the war was a policy of petty bourgeois pacifism. The bureaucracy of the party was united with the bourgeois, People's

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Council, which accepted a Wilson Peace and betrayed those who rallied to the Council in opposition to the war.

This policy necessarily developed into a repudiation of the revolutionary Socialist position. When events developed the test of accepting or rejecting the revolutionary implications of the declaration against the war, the party bureaucracy, immediately exposed its reactionary policy, by repudiating the policy of the Russian and German Communists, and refusing affiliation with the Communist party International of revolutionary Socialism.

#### "PROBLEMS OF AMERICAN SOCIALISM.

"Imperialism is dominant in the United States, which is now a world power. It is developing a centralized, autocratic Federal Government, acquiring the financial and military reserves for aggression and wars of conquest. The war has aggrandized American capitalism instead of weakening it as in Europe. But world events will play upon and influence conditions in this country—dynamically, the sweep of revolutionary proletarian ideas; materially, the coming construction of world markets upon the resumption of competition. Now al-

mighty and supreme, Capitalism in the United States must meet crises in the days to come. These conditions modify our immediate task, but do not alter its general character; that is not the moment of revolution, but it is the moment of revolutionary struggle. American Capitalism is developing a brutal campaign of terrorism against the militant

proletariat. American Capitalism is utterly incompetent on the problems of reconstruction that press down upon society. Its 'reconstruction' program is simply to develop its power for aggression, to aggrandize itself in the markets of the world.

"These conditions of Imperialism and of multiplied aggression will necessarily produce proletarian action against Capitalism, Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the strike-workers trying to usurp functions of municipal government as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being.

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A minor phase of the awakening of labor is the trades unions organizing a Labor Party, in an effort to conserve what they have secured as privileged caste. A Labor Party is not the instrument for the emancipation of the working class; its policy would in general be what is now the official policy of the Socialist Party—reforming Capitalism on the basis of the bourgeois parliamentary state. Laborism is as much a danger to the revolutionary proletariat as moderate, petty bourgeois Socialism—the two being expressions of an identical tendency and policy. There can be no compromise either with Laborism or the dominant moderate Socialism.

But there is a more vital tendency—the tendency of the workers to initiate mass strikes—strikes which are equally a revolt against the bureaucracy in the unions and against the employers. These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial re-

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volts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state.

"Revolutionary Socialism must base itself on the mass struggles of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of Socialism and the proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism.

"Our task is to encourage the militant mass movements in the A. F. of L. to split the old unions, to break the power of unions which are corrupted by Imperialism and betray the militant proletariat. The A. F. of L., in its dominant expression, is united with Imperialism. A bulwark of reaction—it must be exposed and its power for evil broken.

"Our task, moreover, is to articulate and organize the mass of the unorganized industrial proletariat, which constitutes the basis for a militant Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and deepen the action of the militant proletariat, developing reserves for the ultimate conquest of power.

"Imperialism is dominant in the United States. It controls all the factors of social action. Imperialism is uniting all non-proletarian social groups in a brutal State Capitalism, for reaction and spoliation. Against this, revolutionary Socialism must mobilize the mass struggle of the industrial proletariat.

"Moderate Socialism is compromising, vacillating, treacherous, because the social elements it depends upon—the petite bourgeoisie and the aristocracy of labor—are not a fundamental factor in society; they vacillate between the bourgeois and the proletariat, their social instability produces political instability; and, moreover, they have been seduced by Imperialism and are now united with Imperialism.

"Revolutionary Socialism is resolute, uncompromising, revolutionary, because it builds upon a fundamental social factor, the industrial proletariat, which is an actual producing class, expropriated of all property, in whose consciousness the machine process has developed the concepts of industrial unionism and mass action. Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class.

#### "POLITICAL ACTION.

"The Class Struggle is a political struggle. It is a political struggle in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state.

"Revolutionary Socialism does not propose to 'capture' the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly, repudiates the policy of introducing

Socialism by means of legislative measures on the basis of the bourgeois state. This state is a bourgeois state, the organ for the coercion of the proletarian by the capitalist; how, then, can it introduce Socialism? As long as the bourgeois parliamentary state prevails, the capitalist class can baffle the will of the proletariat, since all the political power, the army and the police, industry and the press, are in the hands of the capitalists, whose economic power gives them complete domination. The revolutionary proletariat must expropriate all these by the conquest of the power of the state, by annihilating the political power of the bourgeoisie, before it can begin the task of introducing Socialism.

“Revolutionary Socialism, accordingly, proposes to conquer the power of the state. It proposes to conquer by means of political action,—political action in the revolutionary Marxian sense, which does not simply mean parliamentarism, but the class action of the proletariat in any form having as its objective the conquest of the power of the state.

“Parliamentary action is necessary. In the parliament, the revolutionary representatives of the proletariat meet Capitalism on all general issues of the class struggle. The proletariat must fight the capitalist class on all fronts, in the process of developing the final action that will conquer the power of the state and overthrow Capitalism. Parliamentary action which emphasizes the implacable character of the class struggle is an indispensable means of agitation. Its task is to expose through political campaigns and the forum of parliament, the class character of the state and the reactionary

purposes of Capitalism, to meet Capitalism on all issues, to rally the proletariat for the struggle against Capitalism.

"But parliamentarism cannot conquer the power of the state for the proletariat. The conquest of the power of the state is an extra-parliamentary act. It is accomplished, not by the legislative representatives of the proletariat, but by the mass power of the proletariat in action. The supreme power of the proletariat inheres in the political mass strike, in using the industrial mass power of the proletariat for political objectives.

"Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is the political mass strike. Parliamentarism may become a factor in developing the mass strike; parliamentarian, if it is revolutionary and adheres to the class struggle, performs a necessary service in mobilizing the proletariat against Capitalism. 110

"Moderate Socialism refuses to recognize and accept this supreme form of proletarian political action, limits and stultifies political action into legislative routine and non-Socialist parliamentarism. This is a denial of the mass character of the proletarian struggle, an evasion of the tasks of the Revolution.

"The power of the proletariat lies fundamentally in its control of the industrial process. The mobilization of this control in action against the bourgeois state and Capitalism means the end of Capitalism, the initial form of the revolutionary mass action that will conquer the power of the state. 111

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“UNIONISM AND MASS ACTION.

“Revolutionary Socialism and the actual facts of the class struggle make the realization of Socialism depend upon the industrial proletariat. The class struggle of revolutionary Socialism mobilizes the industrial proletariat against Capitalism—that proletariat which is united and disciplined by the machine process, and which actually controls the basic industry of the nation.

“The coming to consciousness of this proletariat produces a revolt against the older unionism, developing the concepts of industrial unionism and mass action.

“The older unionism was implicit in the skill of the individual craftsmen, who united in craft unions. These unions organized primarily to protect the skill of the skilled workers, which is in itself a form of property. The trades unions developed into ‘job trusts,’ and not into militant organs of the proletarian struggle; until today the dominant unions are actual bulwarks of Capitalism, merging in Imperialism and accepting State Capitalism. The trades unions, being organized on craft divisions, did not and could not unite the workers as a class, nor are they actual class organizations.

“The concentration of industry, developing the machine process, expropriated large elements of the skilled workers of their skill, but the unions still maintained the older ideology of property contract and caste. Deprived of actual power, the dominant unionism resorts to dickers with the bourgeois state and an acceptance of imperialistic State Capitalism

to maintain its privileges, as against the industrial proletariat.

"The concentration of industry, produced the industrial proletariat of unskilled workers, of the machine proletariat. This proletariat, massed in the basic industry, constitutes the militant basis of the class struggle against Capitalism; and, deprived of skill and craft divisions, it turns naturally to mass unionism, to an industrial unionism in accord with the integrated industry of imperialistic Capitalism.

"Under the impact of industrial concentration, the proletariat developed its own dynamic tactics—mass action.

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"Mass action is the proletarian response to the facts of modern industry, and the forms it imposes upon the proletarian class struggle. Mass action starts as the spontaneous activity of unorganized workers massed in the basic industry; its initial form is the mass strike of the unorganized proletariat. The mass movements of the proletariat developing out of this mass response to the tyranny of concentrated industry antagonized the dominant moderate Socialism, which tried to compress and stultify these militant impulses within the limits of parliamentarism.

"In this instinctive mass action there was not simply a response to the facts of industry, but the implicit means for action against the dominant parliamentarism. Mass action is industrial in its origin; but its development imposes upon it a political character, since the more general and conscious mass action becomes the more it antagonizes the bourgeois state, becomes political mass action.

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"Another development of this tendency was Syndicalism. In its mass impulse Syndicalism was a direct protest against the futility of the dominant Socialist parliamentarism. But Syndicalism was either unconscious of the theoretical basis of the new movement; or where there was an articulate theory, it was a derivative of Anarchism, making the proletarian revolution an immediate and direct seizure of industry, instead of the conquest of the power of the state. Anarcho-Syndicalism is a departure from Marxism. The theory of mass action and of industrial unionism, however, are in absolute accord with Marxism—revolutionary Socialism in action.

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"Industrial unionism recognizes that the proletariat cannot conquer power by means of the bourgeois parliamentary state; it recognizes, moreover, that the proletariat can not use this state to introduce Socialism, but that it must organize a new 'state,'—the 'state' of the organized producers. Industrial unionism, accordingly, proposes to construct the forms of the government of Communist Socialism—the government of the producers. The revolutionary proletariat can not adapt the bourgeois organs of government to its own use; it must develop its own organs. The larger, more definite and general the conscious industrial unions, the easier becomes the transition to Socialism, since the revolutionary state of the proletariat must reorganize society on the basis of union control and management of industry. Industrial unionism, accordingly, is a necessary phrase of revolutionary Socialist agitation and action.

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"But industrial unionism alone can not conquer the power of the state. Potentially, industrial unionism may construct the forms of the new society; but only potentially. Actually the forms of the new society are constructed under the protection of a revolutionary proletarian government; the industrial unions become simply the starting point of the Socialist reconstruction of society. Under the conditions of Capitalism, it is impossible to organize the whole working class into industrial unions; the concept of organizing the working class industrially before the conquest of power is as utopian as the moderate Socialist conception of the gradual conquest of the parliamentary state.

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"The proletarian revolution comes at the moment of crisis in Capitalism, of a collapse of the old order. Under the impulse of the crisis, the proletariat acts for the conquest of power, by means of mass action. Mass action concentrates and mobilizes the forces of the proletariat, organized and unorganized; it acts equally against the bourgeois state and the conservative organizations of the working class. The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation.

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"The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat.

**"DICTATORSHIP OF THE PROLETARIAT.**

125 "The attitude toward the state divides the Anarchist (and Anarcho-Syndicalist), the moderate Socialist and the revolutionary Socialist. Eager to abolish the state (which is the ultimate purpose of revolutionary Socialism), the Anarchist (and Anarcho-Syndicalist) fails to realize that the state is necessary in the transition period from Capitalism to Socialism. The moderate Socialist proposes to use the bourgeois state, with its fraudulent democracy, its illusory theory of the 'unity of all the classes,' its standing army, police and bureaucracy oppressing and baffling the masses. The revolutionary Socialist maintains that the bourgeois parliamentary state must be completely destroyed, and proposes the organization of a new state, the dictatorship of the proletariat.

126 "The state is an organ of coercion. The bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state. But the conquest of political power by the proletariat does not immediately end Capitalism, or the power of the capitalists, or immediately socialize industry. It is therefore necessary that the proletariat organize its own state for the coercion and suppression of the bourgeoisie.

"Capitalism is bourgeois dictatorship. Parliamentary government is the expression of bourgeois supremacy, the form of authority of the capitalist over the worker. The bourgeois state is organized to coerce the proletariat, to baffle the will of the masses. In form a democracy, the bourgeois par-

liamentary state is in fact an autocracy, the dictatorship of capital over the proletariat.

"Bourgeois democracy promotes this dictatorship of capital, assisted by the pulpit, the army and the police. Bourgeois democracy seeks to reconcile all the classes; realizing, however, simply the reconciliation of the proletariat to the supremacy of Capitalism. Bourgeois democracy is political in character, historically necessary, on the one hand, to break the power of feudalism, and, on the other, to maintain the proletariat in subjection. It is precisely this democracy that is now the instrument of Imperialism, since the middle class, the traditional carrier of democracy, accepts and promotes Imperialism. 128

"The proletarian revolution disrupts bourgeois democracy. It disrupts this democracy in order to end class divisions and class rule, to realize that industrial self-government of the workers which alone can assure peace and liberty to the peoples.

"Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. The new society organizes as a communistic federation of producers. The proletariat alone counts in the revolution, and in the reconstruction of society on a Communist basis. 129

"The old machinery of the state can not be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a com-

bination of both. It is this state alone, functioning as a dictatorship of the proletariat, that can realize Socialism.

"The tasks of the dictatorship of the proletariat are:

"a) to completely expropriate the bourgeoisie politically, and crush its powers of resistance.

"b) To expropriate the bourgeoisie economically, and introduce the forms of Communist Socialism.

131 "Breaking the political power of the capitalists is the most important task of the revolutionary dictatorship of the proletariat, since upon this depends the economic and social reconstruction of society.

"But this political expropriation proceeds simultaneously with an immediate, if partial, expropriation of the bourgeoisie economically, the scope of these measures being determined by industrial development and the maturity of the proletariat. These measures, at first, include:

"a) Workmen's control of industry, to be exercised by the industrial organizations of the workers, operating by means of the industrial vote.

132 "b) Expropriation and nationalization of the banks, as a necessary preliminary measure for the complete expropriation of capital.

"c) Expropriation and nationalization of the large (trust) organizations of capital. Expropriation proceeds without compensation, as 'buying out' the capitalists is a repudiation of the tasks of the revolution.

"d) Repudiation of all national debts and the financial obligations of the old system.

"e) The nationalization of foreign trade.

"f) Measures for the socialization of agriculture.

"These measures centralize the basic means of production in the proletarian state, nationalizing industry; and their partial character ceases as reconstruction proceeds. Socialization of industry becomes actual and complete only after the dictatorship of the proletariat has accomplished its task of suppressing the bourgeoisie.

"The state of proletarian dictatorship is political in character, since it represents a ruling class, the proletariat, which is now supreme; and it uses coercion against the old bourgeois class. But the task of this dictatorship is to render itself unnecessary; and it becomes unnecessary the moment the full conditions of Communist Socialism materialize. While the dictatorship of the proletariat perform its negative task of crushing the old order, it performs the positive task of constructing the new. Together with the government of the proletarian dictatorship, there is developed a new 'government,' which is no longer government in the old sense, since it concerns itself with the management of production and not with the government of persons. Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism—industrial self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation

of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order.

"THE COMMUNIST INTERNATIONAL.

"The Communist International, issuing directly out of the proletarian revolution in action and in process of development, is the organ of the international revolutionary proletariat; just as the League of Nations is the organ of the joint aggression and resistance of the dominant Imperialism.

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"The attempt to resurrect the Second International, at Berne, was a ghastly failure. It rallied the counter-revolutionary forces of Europe, which were actually struggling against the proletarian revolution. In this 'International' are united all the elements treasonable to Socialism, and the wavering 'centre' elements whose policy of miserable compromise is more dangerous than open treason. It represents the old dominant moderate Socialism; it based affiliation on acceptance of 'labor' parliamentary action, admitting trades unions accepting 'political action.' The old International abandoned the earlier conception of Socialism as the politics of the Social Revolution—the politics of the class struggle in its revolutionary implications—admitting directly reactionary organizations of Laborism, such as the British Labor Party.

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"The Communist International, on the contrary, represents a Socialism in complete accord with the revolutionary character of the class struggle. It unites all the consciously revolutionary forces. It

wages war equally against the dominant moderate Socialism and Imperialism,—each of which has demonstrated its complete incompetence on the problems that now press down upon the world. The Communist International issues its challenge to the conscious, virile elements of the proletariat, calling them to the final struggle against Capitalism on the basis of the revolutionary epoch of Imperialism. The acceptance of the Communist International means accepting the fundamentals of revolutionary Socialism as decisive in our activity.

“The Communist International, moreover, issues its call to the subject peoples of the world, crushed under the murderous mastery of Imperialism. The revolt of these colonial and subject peoples is a necessary phase of the world struggle against capitalist Imperialism; their revolt must unite itself with the struggle of the conscious proletariat in the imperialistic nations. The Communist International, accordingly, offers an organization and a policy that may unify all the revolutionary forces of the world for the conquest of power, and for Socialism. 140

“It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. 141

“The older order is in decay. Civilization is in collapse. The proletarian revolution and the Com-



munist reconstruction of society—the struggle for these—is now indispensable. This is the message of the Communist International to the workers of the world.

“The Communist International calls the proletariat of the world to the final struggle!”

against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

#### SECOND COUNT.

143 And the Grand Jury aforesaid, by this indictment, further accuse the said defendants of the same Crime of Criminal Anarchy, committed as follows:

The said defendants, all in the County aforesaid, on or about the said fifth day of July, in the year aforesaid, but on what particular day the Grand Jury aforesaid is unable more particularly to set forth, feloniously did print, publish, edit, issue and knowingly circulate, sell, distribute and publicly display, and cause and procure to be printed, published, edited, issued and knowingly circulated, sold, distributed and displayed, a certain paper and printed matter called The Revolutionary Age, which said paper and printed matter called The  
 144 Revolutionary Age then and there contained certain writings advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means, and which said writings are the same writings set forth in the first count of this indictment to which reference is hereby made; against the form of the statute

*Indictment.*

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in such case made and provided, and against the peace of the People of the State of New York and their dignity. \* \* \*

EDWARD SWANN,  
District Attorney.

(Endorsement)

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

Filed the 26th day of November, 1919.

Nos. 5 and 7 plead Not Guilty Dec. 1st, 1919;  
Dec. 20th, 1919, Nos. 6 and 8 plead Not Guilty, with  
leave to withdraw up to Dec. 22, 1919. 146

THE PEOPLE

vs.

(1)....., (2).....  
(3)....., (4).....  
(5) JAMES JOSEPH LARKIN,  
(6) CHARLES E. RUTHENBERG,  
(7) BENJAMIN GITLOW, (8)  
ISAAC E. FERGUSON, and  
(9).....  
(2 cases)

Criminal  
Anarchy.

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EDWARD SWANN,  
District Attorney.

A TRUE BILL.

RAYMOND F. ALMIRAL,  
Foreman.

S. C., February 5th, 1920, No. 7, tried and convicted of Criminal Anarchy.

S. C., February 11th, 1920, No. 7, State Prison not less than five years nor more than ten years.

B. S. W.,  
J. S. C.

Witnesses:

Clarence L. Converse,  
Bella Gitlow (Fruchter),  
Anna Rubens,  
Nathan Elkins,  
149 Jack Karpf,  
Henry J. Parker,  
Edwin D. Knappen,  
Rose Pastor Stokes,  
Archibald E. Stephenson,  
Cornelius J. Brown,  
Joseph A. Zimmer,  
Fannie Horowitz.

At an Extraordinary Trial Term of the Supreme Court of the State of New York, holden in and for the County of New York, in the First Judicial District of said State, for the trial of criminal actions, at the Building for Criminal Courts in said County, on Wednesday, the 21st day of January, in the year of our Lord, one thousand nine hundred and twenty.

Present: The Honorable BARTOW S. WEEKS,  
Justice of the Supreme Court of the State of New York, Justice. 152

THE PEOPLE, ETC.,

against

BENJAMIN GITLOW.

On trial for Criminal Anarchy.

That from a Special panel of jurors the following jury is balloted and sworn to well and truly try and a true verdict give according to the evidence, viz.:

1. Frank V. Kennedy,
2. Le Roy L. Vallentine,
3. Samuel H. Harrington,
4. Irving A. Chandler,
5. E. Alfred Knoche,
6. G. Mason Jenney,
7. William Moore,

8. F. Malcolm Farmer,
9. Henry Torrance,
10. Archibald Le Roy,
11. Joshua W. Harper,
12. Frederick R. Terwilliger,

who upon their oath aforesaid do say that the said Benjamin Gitlow is guilty of the crime of Criminal Anarchy.

Wednesday morning, February 11th, 1920.

Present as before.

155 Counsel for the defendant moves for a new trial and in arrest of judgment on various grounds, which motions are in all things severally *denied*, due deliberation being had.

The defendant is arraigned at the bar.

The District Attorney moves for judgment against the defendant.

It is thereupon demanded of the said Benjamin Gitlow what he hath to say why judgment should not be pronounced against him according to law, who nothing further saith unless as before he hath said.

156 Whereupon it is considered, ordered and adjudged by the Court that the said Benjamin Gitlow, for the felony aforesaid whereof he is convicted as aforesaid, be imprisoned in the State Prison at hard labor for the term of the minimum of which shall not be less than *five years* and the maximum of which shall not be more than *Ten years*.

A true extract from the minutes.

WM. F. SCHNEIDER,  
Clerk.

**Order of Affirmance by Appellate  
Division.**

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(Certified Remittitur, fols. 1327-1329.)

At a term of the Appellate Division of  
the Supreme Court, held in and for  
the First Judicial Department, in the  
County of New York, on the 1st day  
of April, 1921.

Present:

Hon. JOHN PROCTOR CLARKE,  
*Presiding Justice.*

" FRANK C. LAUGHLIN,

" WALTER LLOYD SMITH,

" ALFRED R. PAGE,

" EDGAR S. K. MERRELL,

*Justices.*

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PEOPLE OF THE STATE OF  
NEW YORK,

Respt.,

vs.

BENJAMIN GITLOW,

Applt.,

5870

Order of Affirm-  
ance on Appeal  
from Judgment  
entered on Ver-  
dict of a Jury.

An appeal having been taken to this Court by  
the defendant from the judgment of the Supreme  
Court, Criminal Branch, rendered on the 5th day  
of February, 1920, and from an order made by said  
Court denying a motion for a new trial, entered  
on the day of , and said  
appeal having been argued by Mr. Swinburne Hale,

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*Order of Affirmance, Appellate Division.*

of counsel for the appellant, and by Mr. John Caldwell Myers, of counsel for the respondent; and due deliberation having been had thereon, it is hereby unanimously ordered and adjudged that the judgment and order so appealed from be and the same are hereby, in all things, affirmed.

**Opinion of Appellate Division.**

(Certified Remittitur, fols. 1330-1449.)

**SUPREME COURT,**

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**APPELLATE DIVISION—FIRST DEPARTMENT.**

January, 1921.

JOHN PROCTOR CLARKE, *P. J.*  
 FRANK C. LAUGHLIN,  
 WALTER LLOYD SMITH,  
 ALFRED R. PAGE,  
 EDGAR S. K. MERRELL, *JJ.*

THE PEOPLE OF THE STATE OF  
 NEW YORK,  
 Respondent,

vs.

BENJAMIN GITLOW,  
 Appellant.

No. 5870.

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Appeal by defendant from a judgment of conviction under an indictment for criminal anarchy rendered at an Extraordinary Trial Term of

the Supreme Court upon which he was sentenced to the State Prison for not less than five nor more than ten years.

The appellant and three others were jointly indicted on three counts on the 26th day of November, 1919, by a Grand Jury duly impanelled at an Extraordinary Trial Term of the Supreme Court duly convened by the Governor. The first count charges that on the 5th day of July, 1919, defendants feloniously advocated, advised and taught, the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means by certain writings then and there procured, prepared, composed, circulated and distributed by the defendants and caused to be circulated and distributed by them among divers people in the City of New York, which writings are set forth in the indictment and consist of "The Left Wing Manifesto." The manifesto was published in the issue of July 5th, 1919, of the "Revolutionary Age," a weekly publication devoted to the international Communist struggle. The second count charges the defendant with having committed the crime by feloniously printing, publishing, editing, issuing and knowingly circulating, selling, distributing and publicly displaying and causing and procuring to be printed, published, edited, issued and knowingly circulated, sold, distributed and displayed the said issue of "The Revolutionary Age" containing certain writings advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means, and charges that the

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writings are the same as those set forth in the first count. The third count charges that the defendants were evil-disposed and pernicious persons and of most wicked and turbulent dispositions, and unlawfully, wickedly and maliciously intending and contriving to disturb the peace and to excite discontent and disaffection and to excite the good citizens of the state to hatred and contempt of the government and the Constitution of this State, and to solicit, incite, encourage, persuade and procure divers persons to commit acts of violence upon the persons and property of divers of the good citizens aforesaid and to raise and make insurrections, riots, routs, unlawful assemblies and breaches of the peace within the state, and to obstruct the laws and government thereof and to oppose and prevent their due execution, and to procure and obtain arms and ammunition for the more effectual carrying into effect their said most wicked and unlawful intentions and contrivances, on or about said 5th of July, 1919, in the County of New York, by certain writings by the defendants then and there distributed among and displayed to and caused to be distributed among and displayed to the said divers persons, which writings are the same as those set forth in the first count and which writings did unlawfully, wilfully and wrongfully solicit and encourage and attempt and endeavor to incite, persuade and procure the said persons to commit such acts of violence upon the persons and property of the good citizens aforesaid, and to raise and make insurrections, riots, routs and unlawful assemblies and breaches of the peace within the State, and to obstruct the laws and government

thereof and to oppose and prevent their due execution, and to procure and obtain arms and ammunition wherewith and whereby to execute and consummate their said most wicked and unlawful purposes, to the serious damage to the public peace of the state and open outrage of the public decency thereof. The third count was withdrawn on the trial and a general verdict of guilty was rendered on the other two counts.

Appellant was tried separately. At the commencement of the trial and before any evidence was taken, appellant through his counsel admitted full responsibility under §§ 160 and 161 of the Penal Law for the publication and circulation of the manifesto as charged in the indictment. The manifesto set forth in the indictment was shown to have been published in the issue of "The Revolutionary Age" of July 5, 1919.

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Swinburne Hale, of counsel (Walter Nelles and Murray C. Bernays with him on the brief; Charles Recht, attorney), for Appellant.

John Caldwell Myers, Deputy Assistant District Attorney, of counsel (Robert S. Johnstone and Alexander I. Rorke, Assistant District Attorneys, with him on the brief; Edward Swann, District Attorney), for Respondent.

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LAUGHLIN, J.:

The manifesto condemns the Socialist Party and moderate Socialism for confining their advocacy of the overthrow of government to constitutional amendments brought about by the exercise of the

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elective franchise, and it repudiates that method as wholly inadequate to accomplish the purposes of the Left Wing and asserts that they can only be accomplished by a revolution brought about by a mass strike of the proletariat. It does not definitely define who constitute the proletariat but it evidently means those of the working classes who have no property, for it states, in effect, that the concentration of industry and social developments generally "conservatized the skilled workers" and "developed the proletariat of unskilled laborers massed in the basic industries," and that this proletariat, "expropriated of all property" and denied access to the American Federation of Labor Unions, required a labor movement of its own, which became a revolutionary industrial unionism, which "was a recognition of the fact that extra parliamentary action was necessary to accomplish the revolution; that the political state should be destroyed and a new proletarian state of the organized producers constructed in order to realize socialism." It further states that the Socialist Party repudiated the form of industrial unionism and "still more emphatically repudiated its revolutionary political implications, clinging to petty bourgeois parliamentaryism and reform"; that the dominant Socialism in the Socialist Party united with the aristocracy of labor and the middle class and necessarily developed all the evils of the dominant Socialism of Europe and abandoned the "immediate revolutionary task of reconstructing unionism on the basis of which alone a militant mass Socialism could emerge," and stultified "working class political action" by limiting such action "to

elections and participation in legislative reform activity"; that the effect of this was to draw "more and more proletarian masses in the party, who required simply the opportunity to initiate a revolutionary proletarian policy," and that the war and the proletarian revolution in Russia provided the opportunity; that under the impulse of its membership, the Socialist Party adopted a militant declaration against the war but its officials sabotaged this declaration and adopted a policy of "petty, bourgeois pacifism," and the bureaucracy of the party united with the bourgeois People's Council, which accepted the Wilson Peace and betrayed those who opposed the war. It then condemns those in charge of the Socialist Party for their reactionary policy in repudiating the policy of the Russian and German Communists and "refusing affiliation with the Communist International of Revolutionary Socialism," and states, in effect, that owing to the aggrandizement of "American capitalism" by the war and its preparation to meet the crisis in the days to come, the immediate task of the Left Wing is modified but its general character is not altered, and that this is the moment of "revolutionary struggle" but "not the moment of revolution" because "American capitalism" is developing a brutal campaign of terrorism against the militant proletariat, and that these conditions "will necessarily produce proletarian action against capitalism" and "that strikes are developing which verge on revolutionary action and in which the suggestion of proletarian dictatorship is apparent, the strike-workers trying to usurp the functions of municipal government, as in Seattle and Win-

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nepeg." The article then denounces the Socialist Party and labor unions for favoring relief to the working classes only through lawful constitutional methods and states that there is a tendency on the part of workers "to initiate mass strikes," and that such strikes will be the determining feature of proletarian action and they must be used to broaden the strike and "to make it general and militant," first using it for political objectives, finally developing "the mass political strike against Capitalism and the state." It next advises "the militant mass movements" in the American Federation of Labor "to split the old unions" and to break their power and the organization of the "mass of the unorganized industrial proletariat," thereby "developing reserves for the ultimate conquest of power." It then states that a class struggle of a political nature is first to be waged for "immediate concessions" and the final conquering of power "by organizing the industrial government of the working classes" but that "the direct objective is the conquest by the proletariat of the power of the state," and that this is to be done not by capturing "the bourgeois parliamentary state" but by "conquering and destroying it," and therefore "Revolutionary Socialism" repudiates the policy of introducing Socialism by legislative measures on the basis of the existing state. It also states that it is necessary for the proletariat to "expropriate by the conquest of the power of the state" all the political power, the army, police, industry and the press, "before it can begin the task of introducing Socialism," because as long as the bourgeois state exists "the capitalist class can baffle the will of the pro-

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letariat," and that "Revolutionary Socialism" proposes to conquer the power of the state "by class action of the proletariat," but that parliamentary action is necessary "in the process of developing the final action," and that the conquest of the power of the state "is an extra-parliamentary act" and will be accomplished not by "legislative representatives of the proletariat but by *the mass power of the proletariat in action*," and that the "supreme power of the proletariat inheres in the *political mass strike*." It further states that it is necessary to organize a new state in the form of "Communist Socialism—the government of the producers," in which "the proletariat as a class alone counts" and which is "based directly upon the industrial organized producers, upon the industrial unions or Soviets, or a combination of both." The article points out that both anarchists and revolutionary Socialists intend to abolish the state, but that the anarchists in eagerness so to do, fail to realize that the state is necessary "in the transition period" and that the revolutionary Socialists intend to conquer the state by revolution starting with strikes of protest, developing into "mass political strikes and then into revolutionary mass action" and the "annihilation" of the state and the introduction of "the transition proletarian state functioning as a revolutionary dictatorship," which is necessary "to coerce and suppress the bourgeois," and that during the period of such coercion and suppression the proletarian dictatorship represents the proletariat as the ruling class "which is now supreme," and the full conditions of Communist Socialism will be developed and when all industries are nationalized,

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a new government is developed, "which is no longer government in the old sense," for it "concerns itself with the management of production and not with the government of persons," and that "out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism—industrial self-government of the communistically organized producers," and the bourgeois having been completely expropriated "economically and politically," the dictatorship ends and in its place comes "the full and free social and individual autonomy of the Communist order." The manifesto closes by stating that "the organ of the international revolutionary proletariat" is the "Communist International, issuing directly out of the proletarian revolution in action and in process of development," which wages war "equally against the dominant moderate Socialism and Imperialism" and "issues its challenge to the conscious, virile elements of the proletariat, calling them to the final struggle against capitalism," and "issues its call to the subject peoples of the world," and that their revolt is "a necessary phase of the world struggle against Imperialism," and that, therefore, it "offers an organization and a policy that may unify all the revolutionary forces of the world for the conquest of power and for Socialism," and that although "the revolutionary epoch of the final struggle may" last "for years and tens of years" the Communist International "offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of

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the conquest of power," and that the proletariat of the world has been called "to the final struggle" by the Communist International. The Left Wing program, published in the same issue of "The Revolutionary Age," outlines the preliminary steps for organization and co-operation leading to the final mass strike; and the "Communist Program," also published therein, to the same effect as the Left Wing manifesto but in some respects broader and bolder, is accepted and summarized. The manifesto advocates the doctrine that the present machinery of our government, which it is claimed is capitalistic, notwithstanding the fact that the majority rule through universal suffrage and no man's vote or voice in the government counts for more than that of another, should be overthrown and replaced by a government exclusively by the working classes and applicable to production only and on the Russian Soviet order. The churches, schools, colleges and other educational institutions are to be confiscated; but we are not informed concerning the use, if any, to which they are to be put. The doctrine advocated is, that during the reign of the proletarian dictatorship, during which it is admitted that it will be necessary to use force in conquering the bourgeois and expropriating all property, mankind will be so changed that the people will no longer require to be governed. No precedent is pointed to tending to justify these expectations for the realization of this illusory Utopia, under which there shall be only such government as may be had through "workers' councils and similar organizations." But the proletarian dictatorship as it exists in Russia is referred to

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with approval as the *first* great victory and as illustrative of the transition period. The history of the world would seem to indicate that if these expectations are to be realized, there must necessarily be a very prolonged transition period of the proletarian dictatorship, for the overthrow of governments resulting in a proletarian dictatorship is to be brought about by teaching class hatred and revenge. Russia is proudly pointed to as an example of a proletarian dictatorship. The current reports of conditions there show what might be expected from such doctrines, and according to those reports the most barbaric punishment, torture, cruelty and suffering are inflicted upon the bourgeois, including all members of labor unions and the peasantry; and those who do not submit to the proletarian dictatorship are either starved to death or shot, and the survivors are evidently being disciplined by starvation, torture and imprisonment, to the point that they will live in harmony without being governed by the state. Those advocating this doctrine are unwilling to await the practical working of their theories in Russia; and it is fairly to be inferred from some of the statements in the manifesto that their reasons for this are fear that, owing to the fact that Russia is largely an agricultural country, the scheme may not be successful if confined to that country and therefore they deem it necessary at once to make the revolutionary struggle world wide, deeming that greater headway may be made in industrial centres where the proletariat greatly outnumbers the bourgeois. Hence it is that we find these doctrines principally advocated by those who come

from Russia and bordering countries and their descendants, as is the appellant.

It is perfectly plain that the plan and purpose advocated by the appellant and those associated with him in this movement contemplate the overthrow and destruction of the governments of the United States and of all the states, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, as to which in view of the recent decision of the Supreme Court of the United States sustaining the Eighteenth Amendment (*Rhode Island v. Palmer*, 253 U. S. 350) there seems to be little, if any, limitation, but by immediately organizing the industrial proletariat into militant socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. They do not announce in advance how the dictator is to be chosen or just what kind of a government they expect ultimately to have; but they make it quite plain that the property of the states and nation shall be taken over, and that every individual who has any property shall not only be deprived of it but also be deprived of any voice in the affairs of the state, such as they may be, under a government which is not to govern the people but only protection. They do not expressly advocate the use

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of weapons or physical force in accomplishing these results; but they are chargeable with knowledge that their aims and ends cannot be accomplished without force, violence, and bloodshed, and therefore it is reasonable to construe what they advocate as intending the use of all means essential to the success of their program.

After the assassination of President McKinley by an anarchist on the 6th of September, 1901, it was deemed that our laws were inadequate for the protection of organized government, and it appears by Senate Document #26 of the 125th Session in 1902 that a committee of the Senate reported for enactment certain statutes creating and defining the crime of criminal anarchy, which were enacted as §§ 160-166 of the Penal Law by Chapter 371 of the Laws of 1902. The provisions of §§ 160-161, with which only we are now concerned, are as follows:

“§ 160. Criminal anarchy defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

§161. Advocacy of criminal anarchy.

Any person who:

1. By word of mouth or writing advocates, advises, or teaches the duty, necessity or propriety of overthrowing or overturning organ-

ized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies 200  
by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine,

Is guilty of a felony and punishable by imprisonment for not more than ten years, or 201  
by a fine of not more than five thousand dollars, or both."

Counsel for the appellant contends that these provisions should be so construed as to limit their

application to the then recognized doctrine of anarchists for the destruction of all government by assassination and force and thus to end all government, and that the conviction of the appellant thereunder cannot be sustained for the reason that it was not shown that he advocated the destruction of all government by assassination and force, for although he has clearly advocated the overthrow and destruction of all existing governments, it is claimed that the doctrine he advocated contemplates the formation of a government, upon such overthrow and destruction, by a proletariat dictatorship and ultimately by the proletariat. In support of this contention, certain parts of the report of the committee reporting the draft of the law are quoted as follows:

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"The assassination of the late President McKinley by an anarchist who avowedly had no personal grievance against his victim, aroused the people of the nation to the recognition of the fact which thoughtful observers had already appreciated some time before, namely, that immigration of recent years had made the United States the abiding place of numbers of foreigners who, without understanding of our institutions, had brought with them views and prejudices formerly unknown in this country, and doctrines which, if put into effect, would subvert not merely our or any particular form of government, but organized government everywhere. \* \* \*

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It is not a particular crime—the murder or attempt at murder of any particular individ-

ual—which is to be prevented by additional penal legislation or for which additional punishment is to be provided, but rather the prevention of the spreading of doctrines hostile to the safety of our government and of all government, which inevitably tend to lead those who profess them to commit crimes or at least prepare them mentally for their commission. This problem—of reaching those who profess and teach the doctrines of anarchy, without themselves attempting or committing or inciting others to attempt or commit any particular crime—is a difficult one. All will agree, however, that anarchy, by which we mean the doctrine that organized government, of whatever nature whether republican or monarchical, should be overthrown by force, is a criminal doctrine, the teaching and spreading of which should be prevented by penal legislation. \* \* \*

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Organized government must be maintained. To attack it, to preach the doctrine that it should be overthrown, is not the right of anyone. \* \* \* When it ceases, every individual is the prey of his fellows and will have no rights at all except those he can maintain by force.”

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In order properly to construe these provisions of the Penal Law, it is advisable, I think, to consider first what authority the Legislature had to enact laws designed to maintain existing government against overthrow and destruction by forbidding the advocacy within this state of their overthrow

and destruction. I am of opinion that it was entirely competent for the Legislature to make it a crime to advocate within this state the overthrow of the government of the United States or of this or any sister state by any means or method other than constitutional means or methods. It is not necessary to decide whether the interests of the several states in the maintenance of other civilized governments is such that it is competent for the Legislature to prohibit the advocacy within the state of the overthrow or destruction of any other government by any means not authorized for the change or overthrow of such governments, for the doctrines plainly advocate the overthrow of all existing government and the conviction of the appellant rests on the advocacy by him of the overthrow of our own government and every state is interested in the preservation of our national and state governments, and it is, therefore, competent for a state under its police power to enact laws for the protection thereof (*Gilbert v. State*, 141 Minn. 263, *aff'd* 41 Sup. Ct. Rep. 125). Counsel for the appellant contends that these provisions of the Penal Law, unless confined to prohibiting the advocacy of doctrines of anarchy in its strict sense, would be unconstitutional as constituting an abridgment of personal liberty guaranteed by the Fourteenth Amendment to the Federal Constitution, and of the freedom of speech and of writing and publishing one's sentiments and the freedom of the press, preserved by Article I, § 8 of the State Constitution, and he also contends that the enactment of these provisions does not constitute due process of law and therefore is in viola-

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tion of § 6, Article I of the State Constitution and the Fourteenth Amendment to the Federal Constitution. Manifestly, the argument based on lack of due process needs no extended consideration, for he has had and is having due process of law, which entitles him to a hearing and determination by a court of competent jurisdiction. § 8 of Article I of the State Constitution provides as follows: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Under the provisions imposing a responsibility upon the citizen for the abuse of the right freely to speak, write or publish his sentiments on all subjects, the citizen not only becomes responsible to anyone injured by the abuse of this right but, consistently with these constitutional provisions and with the Fourteenth Amendment to the Federal Constitution, he may also be made answerable to the state criminally therefor (*Gilbert v. State*, *supra*; *People v. Most*, 171 N. Y. 423; *Robertson v. Baldwin*, 165 U. S. 275; *Schenck v. U. S.*, 249 U. S. 47; *Fortwerk v. U. S.*, 249 U. S. 206; *State v. Moilene (Minn.)*, 167 N. W. Rep. 345; *State v. Fox*, 71 Wash. 185, *aff'd sub nom. Fox v. Washington*, 236 U. S. 273; *Patterson v. Colorado*, 205 U. S. 454; *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418-439; *Goldman v. U. S.*, 245 U. S. 474; *State v. Quinlan*, 86 N. J. Law 120; *State v. Boyd*, 86 N. J. Law 75, *aff'd* 87 N. J. Law 328; *Turner v. Williams*, 94 U. S. 279). In *Turner v. Williams*, *supra*, the court, in sustaining the constitutionality of an act of Congress



providing for the exclusion of aliens "who join in or advocate the overthrow by force of the government of the United States or other governments," announced a general doctrine as follows: "As long as human governments endure, they cannot be denied the power of self-preservation." In *Schenck v. U. S.*, supra, a conviction was sustained under the Espionage Act for conspiracy to circulate among men called and accepted for military service, a circular tending to and intended to influence them to obstruct the draft, without proof that it had such effect. In *Gilbert v. State*, supra, a similar conviction under a broader state statute was sustained, and it was held that the interest of the state in preserving the union and the several states warranted the enactment of the statute. In *State v. Moilene*, supra, a statute declaring and defining a crime of criminal syndicalism, and prohibiting the advocacy of sabotage or other methods of terrorism as a means of accomplishing industrial or political aims was sustained as constitutional. In *State v. Fox*, supra, a statute making it a crime to edit or publish an article advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of a crime, breach of the peace or act of violence, "or which shall tend to encourage or advocate disregard of the law or for any court or courts of justice," was sustained as not in violation of the constitutional right of freedom of the press. In *People v. Most*, supra, the court, in sustaining the conviction of the defendant for publishing an article calculated to incite a breach of the peace for violation of § 675 of the Penal Code, making it a misdemeanor for any per-

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son wilfully or wrongfully to commit any act seriously endangering the public peace, said:

“Mr. Justice Story defined the phrase (liberty of the press) to mean ‘that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government.’ (Story’s Commentaries on the Constitution, § 1874.) The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack upon private character, for the same section (of the State Constitution) from which the above quotation is taken expressly sanctions criminal prosecution for libel. It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles, as the authorities uniformly hold. (People v. Ruggles, 8 Johns, 290, 297; People v. Muller, 96 N. Y. 408; In re Rapier, 143 U. S. 110.) It places no restraint upon the power of the Legislature to punish the publication of matter which is injurious to society according to the standard of the common law. *It does not deprive the state of the primary right of self preservation.* It does not sanction unbridled license, nor au-

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thorize the publication of articles prompting the commission of murder *or the overthrow of government by force*. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society or the existence of the government. (Story on the Const., § 1878; Cooley on Constitutional Limitations, 518; Ordronaux on Constitutional Legislation, 237; Tiedeman on Police Powers, Sec. 81.)"

In an excellent article written by Henry W. Bikle on the "jurisdiction of the United States over Seditious Libel," published in 50 American Law Register 1, he quotes from Falkard's "Slander and Libel," Chapter XXXIII, p. 368, as follows:

"It is necessarily incident to every permanent form or system of government to make provision not merely for its continuance, but for its secure continuance. To that security the confidence and esteem of the people is indispensable; and therefore it is essential to prohibit malicious attempts to produce the mischiefs of political revolution, by rendering the established constitution odious to the society which has adopted it. The State and Constitution being the common inheritance, every attack, made upon them, which affects their permanence and security, is in a degree an attack upon every individual, and concerns the rights of all. It is, therefore, a maxim of

the law of England, flowing by natural consequence and easy deduction from the great principle of self-defense, to consider as libels or misdemeanors every species of attack by writing or speaking, the object of which is wantonly to defame that economy, order and constitution of things which make up the general system of the law and government of the country."

Mr. Bikle summarizes his views on page 24 as follows:

"The form of government of the United States contains within itself the means of changing either its policy or its structure by constitutional measures. The advocate of such changes who advocates the exercise of constitutional rights for dislodging the party in power or for amending the Constitution can with perfect propriety, we think, claim that he is within the protection of the (first) constitutional amendment. It is when he passes this line and urges illegal and unconstitutional measures to replace the governing party or to overthrow the form of government, that there arises an abuse of that liberty of speech and of the press, which is intended to be secured to the people." 224

Tiedeman on the "Limitations of Police Power," in §81, at page 192, says: 225

"So, also, it is not to be inferred from the prohibition of a censorship of the press, that the press can, without liability for its wrong-

ful use, make use of the constitutional privilege for the purpose of inciting the people to the commission of crime against the public. The newspapers of anarchists and nihilists cannot be subjected to a censorship, or be absolutely suppressed; but if the proprietors should in their columns publish inflammatory appeals to the passion of discontents, and urge them to the commission of crimes against the public or against the individual, they may very properly be punished, and without doubt the right to the continued publication may be forfeited as a punishment for the crime."

So zealously do the courts uphold the constitutional provisions relating to the freedom of speech and of the press and to personal liberty that they construe legislation designed to prevent the abuse of those rights so as to prohibit only what is essential to prevent the abuse at which the statutes are aimed (*State v. Fox, supra*); and the courts in construing such statutes have in some instances said that the danger to be apprehended from a doctrine, the advocacy of which is lawfully and constitutionally forbidden, must be present or immediate (*Schenck v. U. S., supra*; *Masses Pub. Co. v. Patten*, 244 Fed. Rep., 535, reversed 246 Fed. Rep. 24; *Colyer et al. v. Skeffington*, 265 Fed. Rep. 325); and in other decisions it is stated that a question of proximity and degree is involved, and that "the natural tendency and reasonably probable effect" of the words used must be to accomplish the evil which it is the purpose of the statute to guard

against (*Debs v. United States*, 249 U. S. 211; *Commonwealth v. Pesslee*, 177 Mass. 267; *Abrams v. United States*, 250 U. S., dissenting opinion by Justice Holmes at p. 627; *Schaefer v. United States*, 251 U. S. 466; *Pierce v. United States*, 252 U. S. 239). I am of opinion that the common law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here.

The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown, and all public and private property expropriated and nationalized and administered for a time through a proletarian dictatorship and thereafter, in some manner not very definitely disclosed, administered by and for the entire proletariat. I cannot subscribe to the doctrine that it is not competent for the Legislature to forbid the advocacy of such a doctrine designed and intended to overthrow the government in this manner, until it can be shown that there is a present or immediate danger that it will be successful, for such legislation would afford no adequate protection against the apprehended danger, because it is evident that the organization of the proletariat as advised and

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urged, and the spread of the pernicious doctrine, are to be affected in the main secretly; for we are not informed who is to determine when the time for massed strikes will be ripe or who is to call them, and it is evident that a law so limited might only become effective simultaneously with the overthrow of government, when there would be neither prosecuting officers nor courts for the prosecution and punishment of the crimes. In so far, therefore, as it is competent for the Legislature to enact laws to prevent the overthrow of government by unauthorized means, I am of opinion that the initial and every other act knowingly committed for the accomplishment of that purpose may be forbidden and declared to be a crime. We must assume that the Legislature deemed that, unless the advocacy of such a doctrine was prohibited, there was danger that sooner or later the government might be overthrown thereby. That, I think, was sufficient to warrant the enactment of the statute. I know of no right on the part of the aliens who are members of the Left Wing and here merely by sufferance of our government, to advocate the overthrow of our constitutional form of government by unlawful means; and surely naturalized citizens who have sworn to uphold the Constitution have no right to advocate its overthrow otherwise than through the ballot-box and as provided for its amendment, nor have native-born citizens of alien parentage, such as the appellant is, or any other citizen, such right, and they should not be heard to invoke the protection of the Constitution against their prosecution for acts, deliberately performed, calculated

and intended to overthrow and nullify it by unauthorized means (see *Gilbert v. State*, supra). The doctrines advocated are not harmless. They are a menace, and it behooves Americans to be on their guard to meet and combat the movement, which, if permitted to progress as contemplated, may undermine and endanger our cherished institutions of liberty and equality. But if immigration is properly supervised and restricted and the people become aroused to the danger to be apprehended from the propaganda of class prejudice and hatred—by a very small minority, mostly of foreign birth, which has for its object not only the overthrow of government, but the destruction of civilization and all the innumerable benefits it has brought to mankind—there can be no doubt but that the God-fearing, liberty-loving Americans both in the urban and rural communities, who appreciate the equal opportunities afforded by our constitutional form of government, under which the majority rule, and have made are making sacrifices to improve their condition and that of their families, and to accumulate property for themselves and those who come after them, will see to it that these pernicious doctrines are not permitted to take root in America. Since it is competent for the legislature to enact laws for the preservation of the state and nation, the laws required for that purpose rest in the legislative discretion, and if they are reasonably adapted to that end and are based on a danger reasonably to be apprehended, even though not present or immediate, they may not be annulled by the courts either on the theory that it

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would be wiser to leave it to the people to meet the pernicious doctrines by argument, or that they unnecessarily restrict the freedom of speech or of the press or of personal liberty. The Legislature within its authority has spoken for the People, and it is the duty of the courts to enforce the law.

239 The learned counsel for the appellant contends that the general words "or by any unlawful" means, contained in §§ 160-161 of the Penal Law, are limited and restricted by the preceding provisions and, under the rule *noscitur a sociis* or the rule *ejusdem generis*, are to be construed as limited to unlawful means of a like nature to those thereinbefore specified, and that therefore those sections relate only to the advocacy of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of an executive official, and like acts. I am unable to agree with that construction and am of opinion that each of the clauses is to be given separate effect. I think the Legislature specified the known acts and means then and theretofore advocated for the overthrowing and overturning of governments, and that it inserted the words "or by any unlawful means" to cover the advocacy of any new scheme that might be devised for overthrowing or overturning government in an unauthorized manner; but if the Legislature did not then have in mind or foresee that such a scheme for overthrowing government as the appellant advocated might thereafter be devised and advocated, that would afford no obstacle to a construction of these statutes which forbids the advocacy of such

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a doctrine (U. S. v. Mosely, 238 U. S. 383; L. & N. R. R. C. v. Layton, 243 U. S. 617; People v. Abell, 182 N. Y. 415; People v. Hamilton, 183 App. Div. 55-62; People v. Roberts, 148 N. Y. 360; State v. St. Paul etc. Ry., 98 Minn. 330; 25 Ruling Case Law 778). That, I think, is the plain effect of the language employed, and it is a general rule of construction that the Legislature must have intended what it plainly and unequivocally did; and if the language employed is plain, it affords conclusive evidence of the intent of the Legislature (People v. Luhars, 195 N. Y. 377-381; Newell v. People, 7 N. Y. 9-98; People ex rel. Darling v. Wardon, 154 App. Div. 413; Tompkins v. Hunter, 149 N. Y. 117, 122, 123; McCluskey v. Cromwell, 11 N. Y. 593; People ex rel. Smith v. Gillen, 66 App. Div. 25; Gibbons v. Ogden, 9 Wheat. 1, 188; Jackson v. Lewis, 17 Johnston 475). There would be some force in the contention of the appellant if the wording of the statute were "or by any *other* unlawful means," but it does not so provide. Statutes making it a crime for two or more persons to conspire to obstruct the administration of the law or the administration of justice, even where such acts by individuals were not declared to be unlawful, have frequently been sustained (Drew v. Thaw, 235 U. S. 432-438; People ex rel. Childs v. Nott, 187 App. Div. 604, 610, 611). The words "unlawful means" as used in the statute need not be construed as limiting the provisions thereof to the advocacy of the overthrow of government by the commission of a crime, and may be held to have been used in the sense of unauthorized by law, in which sense

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these words are sometimes used in criminal statutes (MacDaniel v. United States, 89 Fed. Rep. 324; State v. Savant, 115 La. 226; see also Century Dictionary, vol. C, p. 6625).

But if these statutory provisions required a construction that the doctrines of themselves be illegal, in the sense that they advocate the commission of a crime—the scheme and program advocated by the appellant and others as shown by the manifesto and Left Wing program, if they do not as a matter of law require the construction that they advocate the overthrow of government by illegal means involving the commission of a crime, warranted a finding to that effect by the jury.

It will be observed that the statutes make the advocacy of the doctrine a crime, without regard to criminal intent. The doing of a lawfully prohibited act, in and of itself, without regard to intent, may constitute the crime (People v. Schaefer, 41 Hun 25); but the language of these statutes is quite general, and, therefore, I think it is essential that the forbidden doctrine be knowingly advocated with a view to the accomplishment of the forbidden purpose. The guilt of the appellant could not be declared as a matter of law, but I think the court might have instructed the jury that the advocacy of the doctrine of these articles violated the provisions of the statutes (Hurnung v. District of Columbia, U. S. Sup. Ct., Nov. 22, 1920). In the case at bar, it was not denied that the appellant knowingly advocated the forbidden doctrine for the purpose of overthrow.

ing government as therein advised. It was conceded that the defendant in part owned and controlled and was the business manager of "The Revolutionary Age," and that he was a member of the National Council of the "Left Wing Section of the Socialist Party," and that he not only had knowledge of the publication of the manifesto, but was responsible therefor and for its sale, circulation and distribution.

In arguing that the defendant by these articles has not advocated the use of force, his counsel says, "If the republic of Hayti has peaceably surrendered its government to the United States, we may have overthrown that government wrongfully, but we have not done it by force or violence or by unlawful means. So in the academically possible event of our peaceably surrendering our own republic to the government of a foreign power. And if a peaceable mass demonstration of all or a large part of the people of any country should prevail upon all the officers of government to cease functioning, and a new set of officials chosen under a new constitution thereafter functioned in fact, without opposition, there again would have been an overthrow, not affirmatively lawful perhaps, but *not* unlawful in its means." We are not now concerned with the action of our government in Hayti, and the verdict of the jury is an answer to this argument in so far as it implies that the appellant and those associated with him did no more than to advocate that the people of this state and country prepare themselves for a peaceable surrender of our republic to a foreign power, or to advocate that

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through a peaceable mass demonstration of the proletariat, all the officers of our state and national governments may be prevailed upon to cease functioning and that a new set of officers may be chosen under a new constitution without the use or exertion of force or violence. The defendant and his fellow socialists of the Left Wing knew perfectly well that such results could not be peaceably accomplished, and, moreover, they are not advocating a change in the constitution or a new constitution or government. They are plainly advocating the destruction of all existing government. The only practical difference between the doctrines advocated by them and the doctrine of anarchy pure and simple is, that they intend to utilize the existing government temporarily while organizing the proletariat for mass strike, and they intend a proletarian dictatorship for a period after the overthrow of the government, and after that a government of production only, which they call Communist Socialism. They cannot evade the statutes on this theory, for plainly the Legislature did not recognize the right to destroy all existing government provided the advocates of the doctrines by which this is to be accomplished contemplate setting up some other form of government, temporarily to be succeeded by another form of government, concerning which their doctrines are nebulous.

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The appellant contends that he was prejudiced by testimony given by a member of the Winnipeg bar, called by the People, showing what the mass strike to which the manifesto referred with appar-

ent approval was. That testimony tends to show that the strike stopped the organized government of the city and that a committee of the strikers took charge of and conducted the affairs of the city in their own way. It is said in behalf of the appellant that he may not have known precisely the form the strike took in Winnipeg or the action of the strikers, and that the reference thereto in the manifesto may have been based on newspaper dispatches or inaccurate information with respect to the strike in Winnipeg. The article does not purport to show the source of the information of the author, but since it was written more than six weeks after the commencement of the strike, which afforded ample time to obtain complete information with regard thereto, and there being no evidence to the contrary, the jury were justified in inferring that the author and the appellant had general knowledge of the conditions existing in Winnipeg, and that the action of the mass strike as there conducted was cited as showing the manner in which the appellant and his fellow members of the Left Wing were advocating the overthrow of government. The testimony was not extended to any acts on the part of the strikers beyond those plainly advocated by the manifesto with respect to mass strikes as the method by which the proletariat expects to overthrow government and take charge thereof through a proletarian dictatorship.

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The court in instructing the jury drew attention to that part of the manifesto and to the evidence with respect to the Winnipeg strike, and then said, "You have heard the evidence of what did occur at

Winnipeg, was that a violation of law?" Counsel for the appellant excepted generally to the language of the court in instructing the jury on mass action and general strikes, and especially in calling attention "to what happened in Winnipeg with reference to its bearing on mass action and general strikes." Appellant now complains of the action of the court in leaving it to the jury to say whether what occurred in Winnipeg was lawful, but no specific exception was taken to that being left to the jury. The court merely left that evidence to the jury as illustrative of what the appellant and others were advocating. There was no evidence with respect to the laws of Canada, and it is perfectly plain that the court meant, and the jury must have understood, that they were to determine whether such a mass strike if it occurred here would have been lawful. It is obvious that it would be unlawful for the proletariat, by means of a mass strike, to oust the regularly constituted officials of a municipality here from their official positions and to take over and usurp their functions and administer the affairs of the municipality through a proletarian dictatorship or committee, for that would be in violation of the constitution and of the laws of the state. Not only, therefore, was the evidence not prejudicial to the appellant, but I think it was entirely competent.

The appellant also contends that the court erred in receiving improper testimony and in permitting the persistent use of improper methods by the assistant district attorney, and took part in exaggerating trivialities and in opening leads into ex-

traneous matters, to the prejudice of the defendant. The evidence to which this criticism is addressed relates to the place of and the circumstances attending the printing and publication of the articles, the methods of conducting the business and distributing the articles, the constitution of the Socialist Party and appellant's connection with it and with the schism therein by which the Left Wing, which he joined, was formed, and the fact that citizenship was not a requisite to membership therein, and that many of its members were aliens. Counsel for the appellant is right in contending that, since the defendant admitted responsibility for the publication and circulation of the articles, including responsibility for the doctrines therein advocated, proof of the other facts to which he objected was not strictly required, for I am of opinion that the violation of the statutes was sufficiently shown by those provisions of the articles which are free from ambiguity. In some respects, however, the doctrines advocated in the articles are vague and indefinite, and therefore the circumstances under which they were prepared, published and circulated, and the purposes of the Socialist Party to which appellant and his fellow members of the Left Wing had been members, and from which they had seceded on the ground that the doctrines advocated by that party were not sufficiently radical—were admissible in aid of the construction of the manifesto. The objections having been overruled, most of the facts thus sought to be proved were admitted, and with respect to those not so admitted it is evident that there was no doubt concerning them, for they stand uncontro-

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verted. The only effect given to these facts was in shedding light on the construction of the manifesto, for the court in submitting the case to the jury made it perfectly clear that the guilt of the defendant was to be determined from the contents of the articles published, and they were submitted to the jury by consent. I am, therefore, of opinion that the evidence was properly received. The conduct of the prosecuting attorney, of which complaint is made, was largely with respect to the admission of the evidence to which reference has been made; but it also relates to repeated attempts to prove acts in connection with the Winnipeg strike, which were excluded by the court. In respect to some of these matters, the criticism is well founded, for there was undue persistence in offering evidence after like evidence had been excluded; but we think no error was committed to the substantial prejudice of the defendant. Error is also predicated on the summing up by the assistant district attorney, but no complaint was made at the time and no objection was taken thereto and no ruling or instruction to the jury was asked thereon and, therefore, those matters are not presented for review (*People v. Srose*, 190 N. Y. 505-510; *People v. Pindar*, 210 N. Y. 191-196). The appellant had been permitted to address the jury personally, and this was followed by a summation in his behalf by a very able and experienced counsel, whose argument extended to a very wide latitude. In answering these arguments, the assistant district attorney quite freely expressed his opinion with respect to the effect of and the consequences that would fol-

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low a mass strike and the overthrow of government thereby. If the appellant claimed prejudice in this respect, he should have objected at the time, so that the court might have ruled whether the manifesto, fairly construed, contemplated the acts which the People claimed it advised and advocated; and if the rulings were not satisfactory, he should have excepted, and the exception would have presented for review the correctness of the rulings and the point whether or not the defendant was prejudiced (*People v. Svoose, supra*; *People v. Pindar, supra*). What is expected will ultimately follow the overthrow of government as advocated by the defendant and others is not made entirely clear by the manifesto. Whether such failure is owing to the fact that the advocates of the doctrine do not know themselves, or whether it has been deliberately concealed in an effort to avoid criminal responsibility, was a fair matter of comment by the representative of the People and for determination by the jury. It is equally clear that the assistant district attorney was justified in arguing and the jury were justified in finding that, notwithstanding the fact that there is in these articles no express advocacy of force and violence in overthrowing government, the use of force and violence is plainly impliedly advocated, for no sane man could expect that, confronted with a mass strike, the constituted authorities of a municipality or state or nation would abandon their duties and surrender their authority to or that public or private property would be given up to a proletarian mob without the use of force or violence. Counsel for appellant contends, in effect, that the advocates of this doctrine hon-

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estly believed that when confronted with the mob in mass strike, owners whose property was theretofore under the protection of the government, whether such property consists of the plants and residences of the capitalists, or of the private property and residences of workmen in the cities, villages and towns, or of the farms in the country, will surrender it without the use of force and violence; but that is too incredible to require discussion. When people combine and advocate such doctrines, there must necessarily be great latitude for reading between the lines to determine what is implied in the doctrine, and they should be held responsible for advocating what they must know is involved in the doctrine and will be essential to the accomplishment of their purpose. That, in effect, is what the assistant district attorney argued, and he was clearly within his rights in so doing. Excepting in extreme cases, where the evidence is insufficient to sustain a conviction, or there is grave doubt with respect thereto, which is not the case here, review on appeal should be confined to the exceptions.

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The complaint as to the attitude of the court is largely with respect to remarks made during the introduction of the evidence, to which reference has been made, and with respect thereto and ruling thereon and suggestions by which hearsay evidence concerning the Winnipeg strike was excluded. With reference to these matters we find no ground for just criticism, for it was entirely proper that the trial court should make suggestions with a view to receiving the evidence offered so far as it

was deemed competent, and to eliminating that which was deemed incompetent.

It is further contended that the court erred in suggesting the existence of a conspiracy. That is predicated on certain remarks made during the course of the trial to which no exception was taken. It is to be borne in mind that the appellant was indicted jointly with others, and while he admitted responsibility for the articles, he did not admit that he wrote them or that he had formally approved them. The remarks of the court were with respect to the evidence offered to show that the articles were formally approved by the Left Wing of the Socialist Party, of which he was a member, and that the appellant in publishing and circulating the articles was carrying into effect the action of his party. The only reference made by the court to a conspiracy was in sustaining an objection made by counsel for the appellant to a question as to whether one Larkin at the last session of the delegates of the Left Wing had led cheers for the Socialist revolution. The court stated that the appellant was being tried for the language used in these articles, and asked how it could be material whether at some prior time he had united in cheers for the Socialist revolution or whether one of his fellow conspirators had led cheers for it. In this connection the court further said, "I say 'fellow conspirators,' because there is a committee here which published this paper," and added that all of the members of the committee might be considered as conspiring and uniting together for its publication. Counsel for appellant thereupon objected

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to the use of the word "conspiracy," as meaning more than "thus uniting," whereupon the court withdrew the remark in so far as it implied wrongdoing, and counsel for the defendant expressed satisfaction therewith and took no exception. Manifestly the defendant was not prejudiced by these remarks.

It is also claimed that the court erred in commenting on the defendant's failure to take the stand and in interfering with his address to the jury. The defendant was stating to the jury what he and his fellow socialists of the Left Wing were informed the war was fought for, and what they understood was the effect of the peace treaty. The court interrupted on the ground that appellant was stating matters not shown to be facts. The appellant thereupon said that the manifesto touched upon those matters; and the court answered that he might use the language of the manifesto, but could not make a speech beyond such languages. Counsel for appellant thereupon asserted that his client had a right to explain the meaning of the manifesto. That, however, he was not attempting to do. The court then, evidently assuming that the appellant and his counsel were insisting that the statement of facts he was making was an explanation of the manifesto, answered that he had no right to explain its meaning, because he had not subjected himself to cross-examination, and an exception was taken by the defendant. It is quite evident that the court did not mean literally that the appellant was not at liberty to take up and discuss what was meant by any particular part of the manifesto,

but merely that under the guise of explaining the meaning of the manifesto he was not to be permitted to make statements of fact not in evidence with respect to the reasons why the manifesto was promulgated. The court also precluded the appellant from illustrating his views by reference to conditions he claimed existed in Russia, but which were not shown by the evidence. There was no error in these rulings.

Error is also predicated on the instructions of the court to the effect that the jury must take the law from the court and not from counsel, and that the criminal anarchy statutes were the law of the state, and that it was so established by the similar case of *People v. Most* (supra). The court was right in instructing the jury that the statutes were constitutional; and there was no error in stating to the jury that he deemed this view sustained by the decision cited.

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It is further claimed that the court in instructing the jury gave too narrow a definition to the statutory crime. The court stated the statutory definition and that the jury must find beyond a reasonable doubt that there was an organized government in this state and country, and that these articles advocated the duty, necessity or propriety of overthrowing or overturning it. To this counsel for the appellant excepted, and he thereupon requested the court to charge, in effect, that the statute merely meant to prohibit the advocacy of a doctrine for the overthrow of all government, and that it did not forbid the advocacy of a change of control of the government from one class or group

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to another, even though such change should be accompanied by drastic or complete changes in the form and policy of the government. That request was properly refused. It was not applicable to the facts. The doctrine advocated by the appellant is not for a change of control of the government, but is for the annihilation of existing governments in general. We are not now concerned with the question as to whether the appellant on these facts could be convicted under this statute for advocating the overthrow of a foreign government. It must be assumed that the conviction followed the charge, under which the appellant could only be convicted if he advocated in violation of these statutes the overthrow of our own state or national government. It is perfectly clear that the doctrines that he advocates are general with respect to all governments, but the jury did not have before them the forms of other governments or the lawful methods for a change thereof, and were given clearly to understand that they were dealing with the defendant for acts committed within the jurisdiction of this state and with respect to our state and national government. A later request by counsel for appellant to charge, which was granted, shows that he claimed that the prohibitions in the statute are confined to violations of our laws.

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It is further contended that the court erred in refusing to charge the appellant's fourth request, that "unlawful means includes only conduct of the same character as force and violence." The court before concluding the main charge took up the appellant's requests and charged some, and charged

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others in a modified form; but made no reference to the fourth. At the close of the charge the court gave the appellant an exception to the requests that had been refused. The court in the main charge instructed the jury that our constitution provided lawful means for overthrowing the government, and that any means advocated, advised or taught for the overthrow of organized government, other than those recognized by law, are unlawful; and that under the law of this state the teaching of such a doctrine is a crime. The Court, however, modified these instructions by charging the defendant's fifth request, which was that the statute only forbids the advocacy of the overthrow of government by "those means which now constitute criminal offences under the laws of this state," and that it does not include any means or actions that the jury might disapprove of or might deem should be declared unlawful, but added that under the laws of this state it is unlawful to take private property without compensation or to conspire to injure the public health or trade or commerce. There was no exception to this modification. The defendant's fourth request placed too narrow a construction on the statute, and the instructions given were most favorable to the appellant. 284

Counsel for the defendant complains now of an additional charge with respect to larceny and conspiracy given in charging the fifth request, and of an observation made by the court expressing serious doubt in so charging the fifth request. It is claimed that the court thereby, in effect, placed upon the appellant the burden of establishing the legality of 285



any unparliamentary or extra-constitutional means advocated by him. The court did not place any burden on the appellant, but merely left it to the jury to determine whether the doctrine advocated by him involves the overthrow of the government by force or violence or any unlawful means.

287 Complaint is also made of the charge with respect to criminal conspiracy and what strikes are lawful. The court charged that strikes in and of themselves are not violations of law, and that persons employed in any calling, trade or handicraft are by express provisions of law permitted to assemble and peaceably co-operate for the purpose of obtaining an advance in the rate of wages or compensation or of maintaining such rate, but that the statutes make it a misdemeanor for two or more persons to conspire to commit an act injurious to the public health, to the public morals, or to trade or commerce, or for the perversion or obstruction of justice or of the due administration of the law; and then left it to the jury to say whether the doctrines advocated by these articles were for the overthrow of the government by the acts of two or more persons in violation of those statutes. I am of the opinion that these instructions were proper and that the jury were warranted in finding that the appellant advocated the overthrow of the government by acts which would constitute a violation of our conspiracy law (Penal Law, Secs. 580 and 582). The court to some extent particularized with respect to the conspiracy statutes by leaving it to the jury to say whether the doctrines advocated the taking of private property unlawfully, or the

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doing of acts injurious to trade or commerce, for the purpose of accomplishing the overthrow of the government. There was no exception taken with regard to this particularization or with respect to any of the matters so particularized. Counsel for the defendant cites § 580 of the Penal Law and *People v. Flack* (125 N. Y. 324); *National Protective Assn. v. Cummings* (170 N. Y. 315); *Bosser v. Dhuy* (221 N. Y. 342), and *Auburn Draying Co. v. Wardell* (227 N. Y. 1), as holding that a criminal intent is an essential element of the crime of conspiracy, and says that the court did not leave any question of criminal intent to the jury. There was no request to have the jury instructed on this point, and no exception taken to the charge on the ground that it did not embrace that element. It is, therefore, too late now to complain of what might have been remedied had the attention of the court been drawn to the point.

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It is also claimed that the court erred in reading to the jury extracts from the constitution of the Socialist Party. That constitution was in evidence, and it appeared that at a convention of the party held in Madison Square Garden in June, 1919, a split occurred on which the militant socialists, including the appellant, who were unwilling to be contented with advocating the overthrow of government by parliamentary or constitutional methods, seceded and formed the Left Wing. The language of the manifesto and the Left Wing program is, as has been seen, to some extent vague and ambiguous. The defendant having been a member of the Socialist Party and having advocated the

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secession and the formation of the Left Wing, the constitution with which he and his associates were dissatisfied was properly considered in determining the meaning of the Left Wing manifesto.

293 The appellant finally draws attention to other parts of the charge which he claims conveyed to the jury minor implications prejudicial to him. They relate, among other things, to instructions to the jury that the doctrines advocated by the appellant were to be determined by the consideration of the article as a whole, and not by particular parts to which his counsel had drawn attention, and to definitions of "proletariat," "bourgeois" and "capitalism." The court was right in charging that the jury should consider the entire manifesto in determining whether appellant advocated a doctrine prohibited by the statutes. The court quoted definitions from standard authorities and writings, and manifested a willingness to charge any definition desired by the appellant, but no request was made to supplement the definitions given or to charge otherwise.

It follows that the judgment of conviction should be affirmed.

All concur.

**Judgment of Affirmance by Court of Appeals.** 295

(Prefixed to Certified Remittitur.)

**COURT OF APPEALS.**

STATE OF NEW YORK, SS. :

PLEAS IN THE COURT OF APPEALS, held  
at Court of Appeals Hall, in the City  
of Albany, on the 12th day of July  
in the year of our Lord one thousand  
nine hundred and twenty two, before  
the Judge of said Court.

Witness, the Hon. Frank H. Hiscock, 296  
Chief Judge, presiding,  
R. M. Barber, Clerk.

Remittitur—July 13th—1922.

THE PEOPLE OF THE STATE OF  
NEW YORK,

Respondent,

ag'st

BENJAMIN GITLOW,  
Appellant.

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BE IT REMEMBERED, That on the 10th day of  
March in the year of our Lord one thousand nine  
hundred and twenty two Benjamin Gitlow.....  
.....the appellant in this cause, came here unto  
the Court of Appeals, by Joseph R. Brodsky, his

298 *Judgment of Affirmance, Court of Appeals.*

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.....attorney, and filed in the said Court a notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, affirming the judgment of conviction in the Supreme Court, New York County.

And The People &c.,..... the respondent in said cause, afterwards appeared in said Court of Appeals by Edward Swann, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

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WHEREFORE, The said Court of Appeals having heard this cause argued by Mr. Walter Nelles .....of counsel for the appellant, and by Mr. John Caldwell Myers of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the ..... judgment ..... appealed from herein be and the same hereby is affirmed.

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.....  
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300 And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

THEREFORE, It is considered that the said judgment be affirmed, as aforesaid.

*Judgment of Affirmance, Court of Appeals.*

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And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court, New York County, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,

Clerk of the Court of Appeals  
of the State of New York.

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COURT OF APPEALS CLERK'S OFFICE }  
Albany, July 13, 1922 }

I hereby Certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

R. M. BARBER,

(Seal)

Clerk.

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**Opinion in Court of Appeals**

(234 N. Y. 131).

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. BENJAMIN GITLOW, Appellant.

(Decided July 12, 1922.)

THIS is an appeal by the defendant from a judgment of the Appellate Division, first department, unanimously affirming a judgment of the Trial Term entered upon a verdict of a jury convicting the defendant of the crime of criminal anarchy.

*Walter Nelles and Joseph R. Brodsky (I. E. Ferguson of counsel)* for appellant.

*Joab H. Banton, District Attorney (John Caldwell Myers of counsel)*, for respondent.

CRANE, J. JAMES LARKIN, Benjamin Gitlow, C. E. RUTTENBERG and ISAAC E. FERGUSON were indicted, tried and convicted for the crime of criminal anarchy as defined by sections 160 and 161 of the Penal Law. So far as applicable to this case the sections read as follows:

"§ 160. Criminal Anarchy Defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"§ 161. Advocacy of criminal anarchy. Any person who;

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety

of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; \* \* \*

"Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

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The offense charged against these defendants of which they have been convicted is that they advised and advocated in a socialist paper known as the *Revolutionary Age* the overthrow and destruction of this government by revolution, violence and the mass strike.

This court, I think, is agreed that these provisions of the Penal Law are constitutional. The First Amendment to the United States Constitution and section 8 of article I of the New York State Constitution, which secure the freedom and liberty of speech and of the press, do not protect the violation of this liberty or permit attempts to destroy that freedom, which the Constitutions have established.

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We said in *People v. Most* (171 N. Y. 423, 431): "While the right to publish is thus sanctioned and



- secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the Legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the Legislature may control and the courts may punish the licentiousness of the press. \* \* \* Mr. Justice STORY
- 311 defined the phrase to mean 'That every man shall have a right to speak, right and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government.' (Story's Commentaries on the Constitution, § 1874.) \* \* \* It places no restraint upon the power of the Legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self preservation. It does not sanction unbridled license, nor authorize the publication of articles
- 312 prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society or the existence of the government."

To the same point reference may be made to *Patterson v. Colorado* (205 U. S. 454, 462); *Schenck v. United States* (249 U. S. 47); *State v. Fox* (71 Wash. 185); *State v. Boyd* (86 N. J. Law, 79).

These sections of the Penal Law make the publication of a paper or document advocating and advising that organized government be overthrown by force, violence or any unlawful means, a felony.

The Constitution, federal or state, does not authorize publications which advocate the assassination of public officials. (*People v. Most, supra.*) Neither does it authorize publications advocating the destruction of the government by violence or unlawful means.

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The legislature of this state, therefore, was within its powers when it enacted sections 160 and 161 of the Penal Law.

It is fair to assume that the legislature had in mind the protection of this state, the states of the Union and of the Union itself. We may fairly assume that the legislature would think of self-preservation rather than the protection of foreign governments. When, therefore, in these sections it used the words "organized government" it must have referred to all organized government in this country, whether it be that of the city, state or nation. To advocate the destruction of the government of the city of New York, or of the state of New York, or of the United States by force or by unlawful means, such as the mass strike, is a violation of these sections of the Penal Law.

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As I understand it the majority of this court are agreed, *first*, upon the constitutionality of

these sections of the Penal Law; *second*, that the sections apply to writings which advocate the destruction of organized government as it exists in this country; *third*, that the *Revolutionary Age*, published by the defendant Gitlow, was a violation of this law, in that it advocated the overthrow of this government by violence, or by unlawful means.

A word now as to this *Revolutionary Age*. What does it advocate? Let it speak for itself. I quote from the original publication which the defendant Gitlow had printed, for which he paid, which circulated to the extent of 6,000 copies, and for which, on the trial, he accepted full responsibility.

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The Left Wing of the Socialist Party broke away from the main body of socialists, because the latter desired to bring about the changes in government by parliamentary methods, too moderate, indeed, for the Left Wing. The Left Wing desired to bring about the social state by revolution, overthrow, violence, and so, in this *Revolutionary Age*, published this manifesto:

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"The world is in a crisis. Capitalism, the prevailing system of society, is in the process of disintegration and collapse. Out of its vitals is developing a new social order, the system of Communist Socialism; and the struggle between this new social order and the old is now the fundamental problem of international politics. \* \* \* The forces of production revolt against the fetters Capitalism imposes upon production. The answer of Capitalism is war; the answer of the proletariat is the Social Revolution and Socialism. \* \* \* The class struggle is the heart of Socialism. \* \* \* But the dominant Socialism accepted the

war as a war for democracy—as if democracy under the conditions of Imperialism is not directly counter-revolutionary! It justified the war as a war for national independence—as if Imperialism is not necessarily determined upon annihilating the independence of nations! \* \* \* The dominant Socialism expressed this unity, developing a policy of legislative reforms and State Capitalism, making the revolutionary class struggle a parliamentary process. This development meant, obviously, the abandonment of fundamental Socialism. It meant working on the basis of the bourgeois parliamentary state, instead of the struggle to destroy that state. \* \* \*

320 The proletariat was urged *not* to make a revolution. The dominant Socialism united with the capitalist governments to prevent a revolution. The Russian Revolution was the first act of the proletariat against the war and Imperialism \* \* \*. But the proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of ‘all power to the Soviets,’— \* \* \*

321 Revolutionary socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat. \* \* \*

Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by

- means of revolutionary mass action and proletarian dictatorship. \* \* \* Revolutionary industrial unionism was a recognition \* \* \* that the political state should be destroyed and a new proletarian state of the organized producers constructed in order to realize Socialism. \* \* \* This is not the moment of revolution, but it is the moment of revolutionary struggle. \* \* \* Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being.
- 323 \* \* \* These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state. \* \* \* The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism. \* \* \* The class struggle is a political struggle. \* \* \* The direct objective is the conquest by the proletariat of the power of the state.
- 324 \* \* \* Revolutionary Socialism, accordingly, proposes to conquer the power of the state. \* \* \* It is accomplished, not by the legislative representatives of the proletariat, but by the mass power of the proletariat in action. The supreme power of the proletariat inheres in the political mass strike, in using the industrial mass power of

the proletariat for political objectives. \* \* \* Actually the forms of the new society are constructed under the protection of a revolutionary proletarian government. \* \* \* The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. \* \* \* The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat. \* \* \* The revolutionary proletariat must, accordingly, destroy this state. \* \* \* The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed."

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It will be seen from the above excerpts that this defendant through the manifesto of the Left Wing advocated the destruction of the state and the establishment of the dictatorship of the proletariat. The way in which this is to be accomplished is by the use of the mass strike; the strike workers attempting to usurp the functions of municipal government as in Seattle and Winnipeg. The strikes advocated by the defendant were not for any labor purposes or to bring about the betterment of the working man, but solely for political purposes to destroy the state or to seize state power. Mass strike means the striking or the ceasing to work by concerted action of, and among, all working classes. Thus government and the functions of government are paralyzed and come to an end.\*

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Section 580 of the Penal Law provides that where two or more persons conspire to commit any act injurious to the public health, to public morals or to trade or commerce, or for the perversion or the obstruction of justice or of the due administration of the laws, each of them is guilty of a misdemeanor. To advocate, therefore, the commission of this conspiracy or action by mass strike whereby government is crippled, the administration of justice paralyzed, and the health, morals and welfare of a community endangered, and this for the purpose of bringing about a revolution in the state, is to advocate the overthrow of organized government by unlawful means.

I think a reading of this *Revolutionary Age* published by the defendant justifies the conclusion of the jurors and of the court below that the defendant was guilty of the crime charged. To this proposition I understand the majority of this court assents.

It is suggested, however, that error was committed in the admission of evidence which requires a reversal of the judgment. Although I recognize that the sentence may have been heavy for the offense, yet I cannot see wherein any error has been committed.

The article published advocates the mass strike. There is no description of the mass strike. We give to these words the meaning which from experience we know them to have. The courts cannot be blind to or profess ignorance of the things which have recently happened in the world. Mass strike means the combined strike of all workers in every field of activity or enough of them to ac-

comply the purpose in view. The mass strike in this article is advocated for the purpose of the political overthrow of the government. It has been accomplished or attempted in particular cities. The article itself says so. "Strikes," so the manifesto reads, "are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg."

The manifesto advocates the revolution by strikes. The proletariat dictatorship, it says, is apparent because the strike workers are trying to usurp functions of municipal government. The strikes which the defendant and the manifesto meant and have reference to are the kind of strikes which happened in Seattle and in Winnipeg. This article plainly states that the defendant and his Left Wing are to bring about the proletariat dictatorship by the mass strike which is the kind of strike that was had in Seattle and Winnipeg.

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The People in this case through Major Furry Ferguson Montague showed what kind of a strike Winnipeg had. He testified that employees in the various departments of activity refused to work. These consisted of the postmen, teamsters, cooks, waiters, clerks, metal workers, garbage collectors, employees in water and electric light supplies, elevator operators, telephone employees. This witness merely stated what happened in Winnipeg. The effect upon Winnipeg and the people of Winnipeg by reason of this mass strike was excluded. The witness was strictly confined by the learned trial justice to the mere statement that the em-

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ployees in the various departments went on a strike. This defendant and his Left Wing advocated in the manifesto the overthrow of this government by strikes such as were had in Winnipeg.

Why could not this evidence be introduced? Suppose the manifesto had advocated the ending of President Harding's administration by the same means that ended Garfield's, would not the court take judicial notice of Garfield's assassination, or would the rules of evidence prevent proof that Garfield was shot? The Left Wing Socialists proposed the destruction of this government and the seizure of state power by means of the mass strike. Such a strike, it is written, has happened in Winnipeg. I, for one, cannot see wherein it is incompetent to show what happened in Winnipeg. In fact, so notorious was the strike and suffering in Winnipeg that the court would be justified in taking judicial notice of it. The press was full of it at the time. What the world generally knows a court of justice may be assumed to know.

This manifesto refers to the Soviet government in Russia. If it advocated the overthrow of this government and the establishment by force of the Soviet government, would it be incompetent for a court of justice to listen to evidence as to the nature of the Soviet government? Cannot the meaning of Soviet government be shown as well as the meaning of any other word used? It is said that this evidence of the Winnipeg strike was very harmful to the defendant. How can that be harmful which he himself has advocated? His paper advocated the overthrow of the government by

a mass strike. The evidence of Major Montague showed what a mass strike was. The defendant used words which have a definite meaning and then seeks to escape the consequences when courts give the words the meaning he intends.

But does he seek to escape the meaning? His brief in this court would indicate the contrary. He or his counsel sees in the Winnipeg incident the beneficence of the proletariat dictatorship.

I quote from his brief: "*On the side of the manifesto*, in spite of inept choice of verbs, the significance given to the Winnipeg strike, was that it represented a new tendency, in that the striker-workers organized themselves in a way to sustain the municipal life as against serious consequences to the residents of the city. The point of the reference is the city-wide organization of the workers—the germ of future 'proletarian dictatorship,' or general working-class government—and the use of this organization to carry on social services."

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It will be seen from these words that the defendant claims that the manifesto itself showed how the workers of Winnipeg sustained municipal life and that the proletariat government was really a good thing.

Under these circumstances and with this claim the admission of the mere statement that at Winnipeg the workmen in various departments went out, was not only competent, but even if incompetent, not harmful. The reference of the trial judge in his charge to the Winnipeg strike followed by the question, "Was that a violation of law?" did not amount to error. That the court had reference to such a strike occurring in New York state being un-

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lawful is apparent from the references following to our law of conspiracy.

As the majority of this court are of the opinion that the defendant was guilty of the crime charged, and as I personally cannot see any error in the admission of the evidence regarding the Winnipeg strike, I am of the opinion that the judgment of conviction should be affirmed.

- 341       HISCOCK, Ch. J. The defendant has been convicted of the crime of criminal anarchy under a statute adopted by the legislature of this state in 1902 dealing with that subject. This conviction was substantially based upon his conceded part and activity in causing the publication and circulation in 1919 of a paper called *The Revolutionary Age* in which was set forth at great length what was called "The Left Wing Manifesto" and in and by which it was claimed and has been found that the defendant advocated the overthrow of our government by force, violence and unlawful means. On his conviction he was sentenced to a long term of imprisonment. We, of course, have no jurisdiction or power to consider the question whether such sentence was a judicious one but must consider simply the question whether the evidence did justify defendant's conviction under the statute
- 342       as it is presented by exceptions surviving the unanimous affirmance, and whether his trial was affected by any substantial error. We shall take up first the manifesto which he helped to publish and circulate and then consider whether it brings him within the prohibition and penalties of the statute which are invoked against him.

As would be expected the introduction and basis of the manifesto is a denunciation of capitalism and its alleged vicious, terroristic and imperialistic tendencies and from whose "last excesses" humanity can only be saved by the "Communist Revolution." It is said that "Now it is the revolutionary proletariat in action that dominates \* \* \* calling upon the proletariat of all nations to prepare for the final struggle against Capitalism." While the term "proletariat" frequently used is not expressly defined in the manifesto it undoubtedly has its usual meaning of the class of unskilled laborers, without property or capital engaged in the lower grades of work. As throwing much light on the remedies for alleged existing evils which it proposes, the manifesto condemns vigorously and at length those who have advocated another form of remedy. It denounces the representatives of moderate socialism because they united with the governments during the war, abandoned the "class struggle," accepted the "bourgeois state" as the basis of activity which "meant working on the basis of the bourgeois parliamentary state instead of the struggle to destroy that state" and their goal became "the co-operation of classes \* \* \* instead of emphasizing \* \* \* that the construction of the Socialist system is the task of the revolutionary proletariat alone" based on "tactics in accord with revolutionary fundamentals." It is said that this Socialist Party "developed into an expression of the unions of the aristocracy of labor—of the A. F. L." (American Federation of Labor).

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- Then in contrast to recognized and constitutional methods of remedy thus condemned and in sequence of thought if not of topical arrangement, the manifesto baldly and boldly proposes and advocates as the remedy for supposed ills the destruction of the state by which is manifestly meant our government. This thought is so definitely and repeatedly expressed that it is unnecessary to occupy much space in emphasizing its presence. But amongst other expressions of it may be quoted the following: "The old machinery of the State cannot be used by the revolutionary proletariat. It must be destroyed." "Revolutionary Socialism \* \* \* insists \* \* \* that it is necessary to destroy the parliamentary State." "Revolutionary Socialism accordingly proposes to conquer the power of the State." "Industrial unionism \* \* \* recognizes \* \* \* that the proletariat cannot use this State (the 'bourgeois parliamentary State') to introduce Socialism, but that it must organize a new State." While the manifesto does not define the word "bourgeois" as used by it, the word apparently is intended to have its ordinary meaning of the middle classes who have property, but who do not belong to the class of capitalists especially marked for destruction or to the proletariat which is to come into revolutionary action.
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- 348 This overthrow and destruction of the state, that is of our organized and recognized government, is to be accompanied by "mass action" and "mass strikes" of the proletariat who for that purpose will effect "mobilization \* \* \* against the bourgeois State and Capitalism." "Conditions of

imperialism and of multiplied aggression will necessarily produce proletarian action against Capitalism, strikes are developing which verge on revolutionary action. Revolutionary Socialism must finally develop the mass political strike against Capitalism and the State." "Revolutionary Socialism \* \* \* proposes to conquer the power of the State \* \* \* by means of political action \* \* \* in the revolutionary Marxian sense which does not simply mean parliamentarism, but *the class action of the proletariat in any form having as its objective the conquest of the power of the State.*" "The supreme power of the proletariat inheres in the political mass strikes, in using the industrial power of the proletariat for political objectives. Revolutionary Socialism accordingly recognizes that the supreme form of proletarian political action is the political mass strike." "These strikes (mass strikes) will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, make it general and militant; use the strike for political objectives and finally develop the mass political strike against Capitalism and the State." "The struggle of the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism."

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On the ruins of the state which is thus to be destroyed there is to be erected a "proletarian state functioning as a proletarian dictatorship." "The Revolutionary Socialist maintains that the bourgeois parliamentary state must be completely destroyed and proposes the organization of a new

state the dictatorship of the proletariat." "It is, therefore, necessary that the proletariat organize its own state for the coercion and suppression of the bourgeoisie." The dictatorship is not very fully defined but it stands out sufficiently that it embodies the class power of the revolutionary proletariat arising upon the destruction of the state and that it is a "recognition of the necessity for a revolutionary state to coerce and suppress the bourgeoisie" and "the proletariat as a class alone counts."

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As further indicating the nature of this dictatorship it is stated that amongst its tasks will be both political and economical expropriation of the bourgeoisie (that is, deprivation of political and property rights), expropriation and nationalization of banks and large organizations of capital, it being significantly added that "expropriation proceeds without compensation."

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But this dictatorship is only a temporary instrument, a "transition" state, whose task it is "to render itself unnecessary." "Together with the government of the proletarian dictatorship there is developed a 'new government' which is *no longer government in the old sense* since it concerns itself with the management of production and not with the government of persons. Out of workers control of industry introduced by the proletariat dictatorship, there develops the complete structure of Communist Socialism—industrial self government of the communistically organized producers. When this structure is completed . . . the dictatorship of the proletariat ends, in its place coming the full and free social and individual au-

tonomy of the Communist order." This is the ultimate consummation for which "The Communist International calls the proletariat of the world to the final struggle."

In the course of the manifesto it was said that strikes were developing which verged on revolutionary action and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government as at Seattle and Winnipeg and that "the mass struggle of the proletariat is coming into being." Because of this reference to the Winnipeg strike the court permitted evidence to be given showing that various classes of employees by concerted action struck, prevented the organized and lawful government from functioning and that a committee of the strikers took charge of and conducted the affairs of the city with results some of which in a general way were described.

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As we read this manifesto interspersed with sentiments and statements such as we have quoted we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism and a mere Utopian portrayal of the blessings which would flow from the establishment of those conditions. We think on the other hand that the jury were entirely justified in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in

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specific terms of the use of assassination or force or violence. There was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the greater subject is described. The accompaniments of great strikes have become such a matter of ordinary experience and observation that no specific words were necessary to inform either the readers of this manifesto or the jury which was passing upon it that a revolutionary mass strike conducted by one great class of workers for the purpose of destroying the rights of all other classes and government itself would not be expected to accomplish its purposes by gentle persuasion and the soft voice of diplomacy, but that conceived in an unlawful conspiracy it would inevitably function with force and violence.

Therefore, assuming that the question is raised by sufficient exceptions, we think the jury was fully justified in finding this defendant, who concededly took part in circulating this proclamation and in impressing it upon the minds of others, guilty of criminal anarchy as defined by statute.

That statute declares that "Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony." It then further provides that any one is guilty of a felony who (1) "By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized govern-

ment by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means, or (2) prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means."

We shall spend no time in discussing the proposition urged upon us that this statute is unconstitutional because it interferes with that freedom of speech and discussion which is secured by the Constitution. Every intelligent person recognizes that one of the great rights secured to the citizens of this country is that of free and fearless discussion of public questions including even the merits and shortcomings of our government. It would be intolerable to think that any attempt could be successfully made to impair such right. But the difference between such forms of discussion and the advocacy of the destruction of government itself by means which are abhorrent to the entire spirit of our institutions is so great that we deem it entirely unnecessary to discuss at length the question whether the legislature of this state may not prohibit the latter without infringing the former. 362 363

Two propositions, however, are earnestly urged which challenge the correctness of the conduct of the trial of defendant and which merit consideration.

As has already been stated evidence was permitted of a strike which had occurred in Winripeg some time before the manifesto was issued and which had been the subject of widespread notoriety. This evidence dealt with the general features of the strike showing how various classes of employees in governmental and public occupations had conspired and combined in a general strike whereby the municipal government was temporarily overthrown and committees of strikers substituted in its place. We doubt if this evidence added much to the inferences which could be fairly drawn from the manifesto itself. But we think that it was competent.

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The manifesto stated: "Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being."

The meaning of the terms "mass struggles" and "mass strikes" as used in the manifesto might not in every respect be self-explanatory and free from doubtful meaning. When the manifesto referring to the Winnipeg strike stated that strikes were developing in which the suggestion of a proletariat dictatorship was apparent and that the mass struggle of the proletariat was coming into being, we think that it referred to and accepted the Winnipeg strike as an illustration of what a proletariat dictatorship would mean and as somewhat a definition of what was meant by mass struggle and that, therefore, evidence of these occurrences

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was competent for the purpose of showing what was meant by the author of this manifesto and what would be understood by those who read it.

The second proposition which is urged upon our consideration is the one that the statute under which the defendant was convicted is aimed at the attempt completely and permanently to destroy and overthrow organized government and that it does not include an attempt at mere revolution whereby there is to be substituted for an existing form of organized government another and different form which would still possess the attributes of organized government. While it doubtless would be something of a shock to citizens of this state to be told that persons born in other countries and saturated with anarchistic and revolutionary notions might come into this state and advocate the overthrow by force of our present government without being liable under this statute provided only they suggested some dictatorship or other form of class and unrepresentative government which possessed some semblance of organization, we shall assume merely for the purposes of this discussion that that is the meaning of the present statute. Other states have adopted statutes broader than the present one and under which attempts at sedition and revolution would be clearly punishable. If our government was not in like manner protected from such attacks, it was a defect in legislation which could be remedied. However, giving to the defendant the benefit of the distinction which he urges between an attempt wholly to overthrow and end organized government and an attempt by revolution to substitute

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one form of government in the place of another, we still think that he was properly convicted and his exceptions unavailing, because he was not advocating in the place of our existing government a condition which could be fairly regarded as an organized government. We think that there was no evidence upon which a jury could be permitted to find that the doctrines which he was advocating proposed the substitution of any real government in the place of that now existing. His manifesto urges that one class shall take possession of all power to the political and economic destruction of other classes and of the state; that there shall be organized a class dictatorship but that this shall only be a temporary instrument and expedient leading to the development of "a new government which is no longer government in the old sense, since it concerns itself with the management of production and not with the government of persons. Out of workers control of industry introduced by the proletariat dictatorship, there develops the complete structure of Communist Socialism,—industrial self-government of the communistically organized producers. When this structure is completed \* \* \* the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order." This may, and to many people doubtless will, sound utterly visionary and foolish. Nevertheless it is the final goal to which this defendant and his manifesto are urging action and in our judgment it is a condition which possesses none of the attributes of organized government and which furnishes no basis for the sug-

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gestion that here was a mere attempt to substitute one form of government for another.

The legislature which adopted this statute was sitting in the state of New York and especially legislating for the people of that state and in protection of the government of that state. Whether they were fully acquainted or not with the historical and technical definitions of communism, anarchy and organized government, we must assume that they had a practical knowledge of what constitutes organized government according to the prevalent notions of the people for whom they were legislating. So we assume that by organized government they contemplated and had in mind at least a government of fixed powers and jurisdiction, functioning along stable and well-defined lines, regardful of the fundamental rights of life, liberty and property, and having the will and the power under ordinary conditions to compel persons to observe those rights.

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We find none of those attributes in the final condition to which this defendant is attempting to lead. In the words of the manifesto itself there is to be "developed a *new* government which is no longer government in the old sense" and in which, if it ever could be realized, self-regulation and chaos would take the place of real government and order.

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In my opinion the judgment should be affirmed.

POUND, J. (dissenting). The basic question is whether sections 160 to 166 of the Penal Law, defining criminal anarchy and prohibiting the advocacy thereof, are applicable to the doctrines of

- the Left Wing of the Socialist party, the communist or revolutionary socialists, as set forth in the manifesto, program or platform issued by the National Left Wing Council and published in *The Revolutionary Age* of July 5, 1919. Revolution for the purpose of overthrowing the present form and the established political system of the United States government by direct means rather than by constitutional means is therein clearly advocated and defended without apology or excuse. Revolution, politically speaking, is a crime against the state, however defensible its purpose may seem to its advocates. Fundamentally a state may, by the exercise of the right of self-preservation, and particularly when at war, protect itself by prohibiting the teaching of revolutionary doctrines. This has been done by the United States (U. S. Espionage and Sedition Act of 1918) and by many states which have adopted sedition statutes punishing things said and done which do not amount to treason, for want of an overt act, but which are treasonable in teaching and tendency. (See list of State War and Peace Statutes affecting freedom of speech. Chaffee on Freedom of Speech, pp. 399 *et seq.*) Revolution may aim to change the form of government, as from a kingdom to a republic, with few radical changes except in the method of choosing public officials. Anarchism, however, means to its philosophic advocates like Tolstoi and Kropotkin, not positive disorder, but the absence of any capable supreme power in the state, whether a king or the representative chosen by the people. The means by which this end may

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be reached are (a) constitutional methods, (b) methods of force and violence or other unlawful means. Anarchy's means of bringing in the anarchistic state, the social order based upon liberty unrestricted by law, are so commonly associated with assassination of public officials and other forms of terrorism that lawful anarchism is regarded as an ideal, a dream or hope, a negligible philosophic abstraction, not calling for any form of action. "The importance of the anarchistic movement was not great in the past, nor does it now play any important part in the revolutionary or seditious movement in this country. Its practical influence upon the affairs of government is limited, being confined, principally, to political assassinations, such as the murder of King Humbert of Italy in 1900, and President McKinley at Buffalo in 1901." (Report of Lusk Committee to investigate seditious activities, vol. 1, pp. 842, 843.) The common definition of an anarchist is: "One who seeks to overturn by violence all constitutional forms and institutions of society and government with no purpose of establishing any other system of order." (Cent. Dict.)

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In 1902 the state of New York adopted the statute under consideration with this definition in mind. The assassination of President McKinley in 1901 had brought forcibly to the attention of the legislature that the publication of articles instigating revolution by the murder of public officials was punishable, if at all, only as a misdemeanor, as an act endangering the public peace, under the catch-all provisions of section 675 of the Penal Code (Penal Law, § 43), which includes

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acts for which no punishment is expressly prescribed. (*People v. Most*, 171 N. Y. 423). To nip in the bud the growth of anarchistic theories and to lessen the possibility of future anarchistic acts or attempts by those whose minds had been excited or poisoned by such publications, the teaching or advocacy of anarchy as then generally understood was made criminal. The advocacy of revolution against organized governments abroad—*e. g.*, by the people of Germany against the Kaiser's government, or by the people of Ireland against the British government—was not the evil contemplated, nor was the advocacy of other seditious activities against the state or the United States so present a danger as to be seriously regarded. Although the Left Wing seeks ultimately the end of organized government and the establishment of the communistic society which is the anarchistic state, this transition is to be achieved by evolution through "the revolutionary dictatorship of the proletariat," as advocated by Marx in the middle of the nineteenth century. To discuss or defend the legality of the means proposed for the accomplishment of this immediate end is an idle task. Such means, even though force and violence are disavowed, are not lawful, for the reason that the form of our government may be lawfully changed only by the vote of the majority of the people, expressed through the ballot by constitutional methods and that method of change is not the method advocated by the manifesto. The orderly constitutional processes of moderate socialism are therein derided as weak and ineffectual.

To compel the government to cease to function by means of the mass strike, to set up the proletariat dictatorship and to expropriate private property, is the pretentious and vicious program glibly advocated. But the question, in clear terms, is not whether this is the doctrine of sedition, criminal conspiracy and rebellion against our form of government, but whether this is the doctrine of criminal anarchy.

This case was tried on the theory that the People had only to establish (1) the existence of a government which was organized and (2) that defendant advocated that such government be overthrown by unlawful means. Proper exceptions were taken to raise the point that advocacy of revolution merely was improperly considered as advocacy of anarchy and that a purpose to destroy all forms of government and to establish life without government must also be shown.

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The United States and the states have a highly organized government, the principles of which are, representative constitutional government, divided between the nation and the states, with three separate departments of political power and proper guaranties of the fundamental rights of life, liberty and property. But organized government need not be representative government or constitutional government. The Czar of Russia, the Mikado of Japan, the Sultan of Turkey and the Shah of Persia, like all other despots, had organized governments with absolute power over their subjects. The despotism of the mob may be as well organized and as little regardful of personal

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rights as it was in the Reign of Terror of the French Revolution. *Organized government is the political power in the state whose commands the community is bound to obey and is the antithesis of government without such political power which is the unorganized or anarchistic state.* Anarchism aims directly to establish such a state by the overthrow of organized government. Left Wing socialism aims first to change the form of government and by unlawful means to substitute therefor another form of organized government, i. e., the dictatorship of the proletariat. This dictatorship is conceived to be an organized government which rules with an iron hand, for it does not aim to rest for its security on the consent of the governed. An attempt to set up such a government is unlawful, but I find nothing in our statute which makes it a crime to teach such revolutionary doctrines and advocate such a change in our form of government, except as such teaching amounts to a breach of the peace as in the *Most Case (supra)*.

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The error of the trial judge was prejudicial to defendant. The advocate of the proletarian class rule, while advocating a vicious doctrine subversive to our institutions and menacing the orderly rule of law, is advocating, not anarchy, but something entirely different. The setting up of the dictatorship of the proletariat would be a far-reaching change in the form of government, but it would not be the destruction of all organized government. The statute is aimed historically only at advocacy of the latter doctrine. Although the

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defendant may be the worst of men; although Left Wing socialism is a menace to organized government; the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected. Defendant has been convicted for advocating the establishment of the dictatorship of the proletariat and not for advocating criminal anarchy.

The judgment should be reversed and a new trial ordered.

HOGAN, McLAUGHLIN and ANDREWS, JJ., concur with CRANE, J.; HISCOCK, Ch. J., concurs in opinion, in which also HOGAN, McLAUGHLIN and ANDREWS, JJ., concur; POUND, J., reads dissenting opinion, in which CARDOZO, J., concurs.

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Judgment of conviction affirmed.

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**Order on Remittitur.**

At a Term of the Supreme Court held  
in and for the County of New York,  
on the 21st day of July, 1922.

Present:

HON. EDWARD R. FINCH,  
*Justice.*

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THE PEOPLE OF THE STATE OF	}
NEW YORK,	
Respondents,	
BENJAMIN GITLOW,	
Appellant.	

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396

Whereas, heretofore, to wit: at a term of the Supreme Court (Criminal Branch) Part I in and for the County of New York, held at the Criminal Courts Building, in the Borough of Manhattan of the said City, on the 5th day of February, 1920, the above named appellant was in due form of law convicted by the verdict of a jury of a felony, to wit: Criminal Anarchy whereupon, to wit, on the 11th day of February then next ensuing, it was considered by the said Court and ordered and adjudged, that the said appellant, for the felony aforesaid whereof he was convicted as aforesaid, be imprisoned in the State Prison at hard labor for the term of five to ten years.

And Whereas, the appellant aforesaid, thereafter duly appealed from the said judgment to the

Appellate Division of the Supreme Court of the State of New York for the First Department.

And Whereas, at a Term of the Appellate Division of the Supreme Court, held in and for the First Department, to wit: at the Court House thereof in the County of New York, on the 1st day of April in the year of our Lord one thousand nine hundred and twenty-one the said judgment of this Court was by the judgment of the said Appellate Division in all things affirmed.

And Whereas, the appellant aforesaid thereafter duly appealed from the judgment of the said Appellate Division to the Court of Appeals of the State of New York.

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And Whereas, at a term of the said Court of Appeals, held at the Capitol in the City of Albany, on the 12th day of July, in the year of our Lord one thousand nine hundred and twenty-two, the said judgment of the said Appellate Division was by the judgment of the said Court of Appeals in all things affirmed, and the record herein and the proceedings in the said last-mentioned Court upon the said appeal, were by the said judgment remitted to this Court, there to be proceeded upon according to law, as by the remittitur of the said Court of Appeals now on file in this Court, more fully appears.

Now, therefore, on reading and filing the said remittitur, and on motion of Joab H. Banton, Esquire, District Attorney, it is

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Ordered, that the said judgment of the said Court of Appeals be and the same hereby is made the judgment of this Court, and it is further

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*Order on Remittitur.*

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Ordered, that the said judgment of this Court so appealed from as aforesaid and so affirmed, and the said judgment of the Appellate Division of the Supreme Court herein, be and the same are hereby directed to be enforced and carried into execution and effect.

Enter

E. R. F.

J. S. C.

401

A Copy.

JAMES A. DONEGAN

Clerk

This copy correct

ROBT. E. NICHOLLS

Asst. Special Deputy Clerk  
of the Supreme Court.

402

**Order Amending Remittitur.**

403

(Prefixed to Certified Remittitur.)

## STATE OF NEW YORK

## IN COURT OF APPEALS

At a Court of Appeals for the State of  
New York, held at Court of Appeals  
Hall in the City of Albany, on the  
..... tenth ..... day  
of October ..... A. D. 1922.

404

Present,

Hon. FRANK E. HISCOCK,  
*Chief Judge, presiding.*

THE PEOPLE, &c.,  
Respondent,

VS.

BENJAMIN GITLOW,  
Appellant.

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A motion to amend the remittitur in the above  
cause having been heretofore made upon the part  
of the appellant herein, and papers having been  
duly submitted thereon, and due deliberation there-  
upon had:



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*Order Amending Remittitur.*

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ORDERED, that the said motion be and the same hereby is granted and said remittitur amended by inserting therein the following statement: "The question whether the New York Criminal Anarchy Law (Penal Law, Sections 160-161) and its application in this case is repugnant to the provision of the Fourteenth Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law was considered and passed upon by this court;" and the Supreme Court is hereby requested to direct its clerk to return said remittitur to this court for amendment, accordingly.

407

(A Copy)

(Seal)

R. M. BARBER  
Clerk.

408

**Petition for Writ of Error.**

409

**SUPREME COURT  
OF THE UNITED STATES.****BENJAMIN GITLOW,  
Plaintiff-in-Error,****against****THE PEOPLE OF THE STATE OF  
NEW YORK,  
Defendants-in-Error.**

410

Now comes Benjamin Gitlow, the defendant below, by Walter Nelles, his attorney, and says that on or about the 13th day of July, 1922, a judgment and order was made in the Court of Appeals of the State of New York and remitted to and entered and filed in the Supreme Court of the State of New York, County of New York, and a judgment and order entered thereon accordingly in said Supreme Court on July 21, 1922, affirming the judgment and order of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department entered and filed on or about the 1st day of April, 1921, affirming a judgment of conviction made and entered in the Supreme Court of the State of New York on or about the 11th day of February, 1920, finding said defendant guilty of Criminal Anarchy and sentencing him to be imprisoned in the State Prison at hard labor for a term of not less than five and not more than ten years, in which judgment and

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the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said defendant involving the construction and application of the Constitution of the United States, all of which more fully appears in the assignment of errors filed herewith.

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WHEREFORE said defendant prays that a writ of error may issue in his behalf out of the Supreme Court of the United States for the correction of the errors so complained of and that a transcript of the record and proceedings in this cause duly authenticated may be sent to the Supreme Court of the United States; and that said writ of error may be made a supersedeas and that your petitioner be released on bail pending the final disposition of said writ of error.

Dated, New York, July 22, 1922.

BENJAMIN GITLOW,  
Petitioner.

By WALTER NELLES  
His Attorney  
80 East 11th Street  
New York City.

**Order of Mr. Justice Brandeis Referring Application to the Full Court.** 415

This application for writ of error was presented to me the 22nd day of July, 1922. Thereafter, while it was under consideration, the copies of the remittitur and order thereon were submitted under date of August 12, 1922. And on this 19th day of August, 1922, I refer the application to the full Court and direct that notice be given to the Attorney General of New York.

LOUIS D. BRANDEIS

*Associate Justice of the Supreme Court  
of the United States*

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**Assignment of Errors.**

SUPREME COURT

OF THE UNITED STATES.

BENJAMIN GITLOW,  
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF  
NEW YORK,  
Defendants-in-Error.

417

Now comes Benjamin Gitlow, defendant below, by Walter Nelles, his attorney, and files the following assignment of errors on which he will rely

in the prosecution of a writ of error to review the judgment and order of the Court of Appeals of the State of New York made and remitted to the Supreme Court of the State of New York on or about the 13th day of July, 1922, and made the judgment of said Supreme Court by an order entered and filed therein on or about the 21st day of July, 1922, which judgment affirms the judgment and sentence rendered and pronounced against said defendant in said Supreme Court of the State of New York on or about the 11th day of February, 1920:

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FIRST: That the Trial Court erred in overruling the objection of the defendant's counsel to the taking of any evidence under the indictment upon the ground that the so-called Criminal Anarchy laws of the State of New York, under which the indictment purported to be framed, are in contravention of the provision of the Fourteenth Amendment to the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law.

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SECOND: That said Court erred in denying the motion made by defendant's counsel at the close of the evidence that the Court instruct the jury to return a verdict of not guilty upon the grounds stated in said objection to evidence.

THIRD: That said Court erred in denying the motion made by defendant's counsel at the close of the evidence that the Court dismiss the indictment and direct an acquittal upon the same ground and upon the further grounds that the indictment

does not charge an offense and the evidence does not show an offense.

FOURTH: That said Court erred in denying the motion in arrest of judgment made by defendant's counsel after verdict and before sentence upon the ground that the statute under which the indictment was framed is unconstitutional and void upon the ground heretofore stated and as legislation upon a subject solely and exclusively in the jurisdiction of Congress and not of the State Legislature.

FIFTH: That said Court erred in not holding that the conviction of the defendant deprived him of liberty without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. 422

SIXTH: That said Court erred in denying the defendant's second request to charge, which was as follows:

"Advocating, advising or teaching the duty, necessity or propriety of overthrowing organized government by force or violence, or by any unlawful means, within the meaning of the criminal anarchy law, means the advocacy, teaching or advising, or the publication of articles advising, teaching or advocating some definite and immediate act or acts of force or violence, or of other definite and immediate unlawful acts directed towards the overthrowing of organized government." 423

SEVENTH: That said Court erred in denying the defendant's third request to charge, which was as follows:

"Any person, under the laws of the State of New York, has the right to advocate the complete change of the structure and policies of government, or to advocate the abolition of all government, unless that advocacy includes also the teaching or advising of the duty, necessity, or propriety of doing some immediate and definite act or acts which constitute force, violence, or other unlawful means."

EIGHTH: That said Court erred in denying the defendant's eighth request to charge, which was as follows:

"Unless you find that the defendant intentionally put into writing language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the first count of the indictment."

NINTH: That said Court erred in denying the defendant's ninth request to charge, which was as follows:

"Unless you find that the defendant intentionally published or issued, or circulated with knowledge of the nature of the publication, language reasonably and ordinarily cal-

culated to incite certain persons to acts of force or violence or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the second count of the indictment."

TENTH: That said Court erred in charging the jury as follows:

"In this organized government there is a lawful means to overthrow it, the means provided in the constitution, the means recognized by law, the means which do not in any way violate the law of the land. If means advocated, advised or taught for the overthrow of organized government are other than those recognized by law, they are unlawful, and under the statute of this state, the teaching of such a doctrine is a crime." 428

ELEVENTH: That said Court committed numerous other errors to the prejudice of the defendant.

WHEREFORE the defendant prays that the judgment and sentence herein and the judgments affirming the same be reversed and held for naught.

Dated, New York, August 10, 1922.

BENJAMIN GITLOW, 429  
Plaintiff-in-Error

By WALTER NELLES,  
his attorney  
80 E. 11th Street,  
New York



## PEOPLE OF THE STATE OF NEW YORK

against

BENJAMIN GITLOW.

**CHARGE.**

WEEKS, J. (charging the jury): Gentlemen of the Jury:

The last stage in the trial of this defendant upon the indictment charging him with the crime of criminal anarchy has now been reached. The Court desires to express to all of the gentlemen of the jury its appreciation of their unselfish public service in their faithful attention and attendance in the trial of this case. Under our form of jurisprudence, jurors who sit in the trial of a criminal case are performing the highest duty and privilege of citizenship. You have been selected from the mass of your fellow citizens by the united consent of the representative of the People of the State, and also of this defendant, to determine the questions of fact involved in this trial. No man sits in this jury box except by the absolute selection and consent of this defendant. You have sworn to determine this issue upon the evidence, and the evidence alone. You have sworn to determine this issue without fear or favor, without prejudice or sympathy. And all parties to this litigation, which means the entire citizenship of this state, including the defendant, believe implicitly that you will perform your duty according to the oath that you have taken.

The case has been fully, fairly and ably presented. The Assistant District Attorney has performed his duty with ability and skill, with a consciousness of the responsibility resting upon him. The defendant has had the advantage of counsel of eminence, of deserved eminence, of great experience, of unusual skill in the presentation of a case, exceeding charm of personal manner, and of wonderful persuasiveness in argument. But you must bear in mind that arguments of counsel are not evidence. They are only aids to the determination by the jury of the facts, and become of value to the jury only as they are based on the evidence in the case, and only as they apply within the rules of law, as laid down to you by the Court.

At the outset of this charge, I deem it proper to explain to you the different functions which the court and jury perform upon a trial. Under our system of jurisprudence, the functions of the court and of the jury are separate and distinct, and a proper trial can only be had when the court and the jury are each careful to perform their own functions, and careful each not to invade the sphere of action of the other. It is the duty of the court during the trial to pass upon the competency and admissibility of all evidence that is offered, and finally to declare to the jury the law which should guide them in determining the particular questions of fact involved. It is the duty of the jury to accept the rules of law as declared by the court, and to apply those rules in determining the

questions of fact. The jury are the sole and exclusive judges of all questions of fact. It is also for the jury to determine what inference if any may properly be drawn from the facts that have been proved. The jury also are the sole and exclusive judges of the credibility of the witnesses, and the weight that should be attached to their testimony.

Bearing those principles in mind, let me first call to your attention the last matter referred to by counsel for the defense in his address to you. You are not sitting here to determine any question of the rights of free speech. The law of this state is that the statute under which this defendant is charged is not an invasion of any right of free speech. That question, so far as this court is concerned, is fully disposed of by the opinions of the courts of this state.

In a somewhat similar case, Mr. Justice McLaughlin, then a member of the Appellate Division, now a Judge of the Court of Appeals, the highest court in this State, used this language:

"Every civilized nation heretofore has existed and hereafter must exist, if at all, by the enforcement of law. Its recognition and enforcement are the safeguards of the state. Indeed, upon it depends its existence. It is the bond which binds the people together, and upon which they must rely for protection both in their persons and property. It is the one thing which limits the rights of one to the line where the rights of another come in; which protects the weak against the strong, and insures to all, equal rights. Without it, chaos reigns, and brute force becomes substituted for right." "It is claimed (referring to the article of the Constitution) that the defendant had the right to express himself in the manner which he did, but the provision of the Constitution referred to, manifestly does not give to a citizen the right to murder, nor does it give him the right to advise the commission of that crime by others. What it does permit is liberty of action only to the extent that such liberty does not interfere with or deprive others of an equal right. In the eye of the law each citizen has an equal right to live, to act, and to enjoy the benefit of the laws of the state in which he lives, but no one has a right to use the privileges so conferred in such a way as to injure his fellow citizens, and one who imagines that he has, labors under a serious misconception, not only of the true meaning of the constitutional provision referred to, but his duty and obligations to his fellow citizens and to the State itself."

In the Court of Appeals of this State, the final arbiter on legal questions, so far as this State and its citizens are concerned, Mr. Justice Vann, writing the opinion of that court, used this language: "The Constitution of our State provides that 'every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law should be passed to restrain or abridge the liberty of speech or of the press.' While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and

authority to provide for and publish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime, or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the legislature may control, and the courts may punish the licentiousness of the press. 'The liberty of the press,' as Chancellor Kent declared in a celebrated case, 'consists of the rights to publish, with impunity, truth, with good motives and for justifiable ends, whether it respects governments, magistracy, or individuals.' Mr. Justice Storey defined the phrase to mean 'that every man shall have a right to speak, write and print his opinions upon any subject whatsoever without any prior restraint, so always that he does not injure any other person in his rights, person, property or reputations; and so always that he does not thereby disturb the public peace, or attempt to subvert the government.' \* \* \* The Constitution places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn, as not sanctioned by the constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society, or the existence of the government."

That is the law which you must under your oaths respect and follow.

This defendant has been indicted by the Grand Jury of this County for the crime of criminal anarchy. The indictment itself is a mere written accusation charging the defendant with the commission of a crime. It is without probative force, and carries with it no implication of guilt. The crime of which the defendant with others is accused, is one of the gravest known to our law, because of its far-reaching consequences to the form of government under which we live, and to which we owe so much. This case is of the greatest importance to this defendant, and also to the People of the State of New York. It is important to the defendant because his liberty is involved, and it is of importance to the State of New York because if this charge against him be proved, he has advocated or advised the overthrow of our government.

There are certain rules applicable to every criminal trial which it is the duty of the jury to apply in this case, in determining the questions of fact involved. These rules relate to the presumption of innocence and to reasonable doubt.

I will define these rules to you, and it is your duty to apply them in endeavoring to reach a conclusion in this case. The defendant is presumed to be innocent until the contrary is proven. That presumption of innocence continues with the defendant throughout the

trial, until the jury, by their verdict, pronounce him guilty, if they do arrive at such a verdict. The defendant is not required to prove his innocence. The burden of proof rests upon the prosecution. The prosecution must establish the guilt of the defendant beyond a reasonable doubt. If the jury entertain a reasonable doubt as to the guilt of the defendant, they must acquit him. A reasonable doubt is not a mere whim, guess, or surmise, nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing. It is such a doubt as a reasonable man may entertain after a careful and honest review and consideration of all the evidence of the case. It must be found in reason. It must survive the test of reason, or the mental process of a reasonable examination.

The rule of law to which I refer does not mean that the defendant must be proven guilty beyond all doubt, because in many cases that would be an impossibility. The law says that the defendant is entitled to the benefit of a reasonable doubt, not all doubt. The reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining, if he is called upon to give a reason. It is not an imaginary or unsubstantial doubt.

The law of this state further provides that the defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him. That is the law of the state. That provision you must bear in mind.

The specific crime for which this defendant is indicted is called in the statute criminal anarchy. That is defined in the statute as follows:

"Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine, either by word of mouth or writing, is a felony."

There is probably no word in that section of the Code which requires any explanation or definition to a jury of educated and intelligent men, but there is one word there which is again used later in the statute, and for that reason I shall read the dictionary definition of the verb "to advocate." It is defined in the Century Dictionary as follows: "To plead in favor of; defend by argument before a tribunal; support or vindicate." The statute proceeds and states that any person who by word of mouth or writing, advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means, is guilty of a felony.

It is under that subdivision of the section that the first count in this indictment is framed.

The second count in the indictment is framed under the next subdivision of the section.

"Any person who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper,

document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means, is guilty of a felony."

Under that subdivision the second count in this indictment is framed.

It is charged that this defendant by writing did advocate, advise and teach the duty, necessity or propriety of overthrowing organized government, and it is charged that he was concerned in printing, publishing, issuing, and knowingly circulating, selling and distributing a printed document containing, advocating, advising or teaching such doctrine.

Do you desire me to charge anything on the theory of an accomplice, requiring corroboration under our statute?

Mr. Darrow: No, your Honor; I do not think that it is in this case myself.

The Court: I shall not charge it unless you request it.

Mr. Darrow: I shall not request it.

The Court: Now, what must be established in order to make out the charge against this defendant? There must be, first, a government which is organized. Are you satisfied beyond a reasonable doubt that there is an organized government in this state and in this country? I do not think that is open to question. Next, there must be something written or spoken which either advocates, advises or teaches that it is a person's duty, that it is necessary, or that it is proper, that such organized government should be overthrown. That is a question of fact likewise for you to determine.

The People have placed in evidence a weekly paper which it is claimed shows upon its face that it was owned by a national council of a certain organization or party called the Left Wing of the Socialist Party, of which council this defendant was one, and in the publication of which this defendant was the business manager. There is evidence which you will consider and determine whether you will believe it or not that the arrangements for the publication of this particular number of the magazine were made by the defendant, that he brought to the printer the manuscript copy. You will recall the printer's testimony upon that subject, first stating that the defendant brought it, and afterwards admitting that upon some previous occasions he had said that he did not know who brought it. There is evidence that the payment for it was made by the defendant through a check of Rose Pastor Stokes, which, not being good at the bank, was brought back to the defendant, and he arranged to make it good; and there is the concession made by his counsel that he was responsible for the publication.

If you believe that evidence, the next issue for you to determine is whether this article is of the character described in the statute. The defense has requested the court to charge, and the court does charge, that words are to be construed according to their obvious common understanding, and not to conjectured secret intentions.

If there is a secret or covert meaning, it must be known to those addressed. Language is not to be forced or tortured in order to bring it within the prohibitions of the law. The fact that super-sensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some meaning which brings it within the prohibitions of the law, is not sufficient. Language is to be taken in its plain ordinary sense. The language which apparently belongs to a special domain of learning, or to a special science or purported science, is to be read and understood in accordance with the entire body of learning or science. It is to be assumed that those who are interested or concerned with the particular article under inquiry are likewise interested and more or less informed as to this special body of learning in general. An article or writing such as the publication incorporated in each of the three counts of the indictment in this case must be taken as a whole, each part being understood in relation to the rest of the article.

That of course is true, and in your consideration of the meaning and intent and the purpose of this article, you must take the entire article into consideration and must not limit your views of the purpose and intent and meaning of the article to those few portions of it which counsel for the defendant in his address to the jury saw fit to call to their attention. The entire article must be read and considered together.

Counsel for the defense also requests me to charge, and I do charge, that a statement or analysis of social and economic facts and of historical incidents, accompanied by prophecy, as to the future course of events with reference to the industrial system and the state or political organization of society, does not constitute the offence charged by either of the three counts of the indictment.

That is also manifestly true. A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. Nor if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. The words in this article, as requested by the defendant, must be taken in their ordinary meaning, in the meaning that would be understood by people whom it might reach or to whom it might be addressed. Is it addressed to anyone in particular? Or is it a mere historical recital, accompanied by a prophecy in the nature of an essay, without any intent expressed directly in, or necessarily to be concluded from, the language used? That is for you to determine.

Proof has been made, the sufficiency of which however is for you to determine, that there is in existence in this country an organization by name the Socialist Party, membership in which is granted to anyone of the age of eighteen years and upwards, without discrimination as to sex, race, color or creed, who has severed his connection with all other political parties and political organizations, and subscribes to the principles of the Socialist Party, including



political action, and unrestricted political rights to both sexes. "No person holding an elective public office by gift of any party or organization other than the Socialist Party shall be eligible to membership without the consent of his state organization, nor shall any member of the party accept or hold any appointive public office, honorary or remunerative (civil service positions excepted), without the consent of his state organization. No party member shall be a candidate for public office without the consent of the city, county or state organization, according to the nature of the office. All persons joining the Socialist Party shall sign the following pledge: 'I, the undersigned, recognizing the class struggle between the capitalist class and the working class, and the necessity of the working class organizing itself into a political party for the purpose of obtaining collective ownership and democratic administration and operation of the collectively used and socially necessary means of production and distribution, hereby apply for membership in the Socialist Party. I have no relations as member or supporter with any other political party. I am opposed to all political organizations that support and perpetuate the present capitalist profit system, and I am opposed to any form of trading or fusing with any organization to prolong that system. In all of my political actions while a member of the Socialist Party, I agree to be guided by the constitution and platform of that party.' Any member of the Socialist Party elected to an office who shall in any way vote to appropriate money for military or naval purposes or war, shall be expelled from the party."

There is evidence that the defendant was a member of that party, and that there occurred some differences of opinion in the party, resulting in the organization of what was termed the Left Wing of the Socialist Party, which would seem to be, from the language of its program and in the communist program, both of which were adopted,—and when I say that these things seem to be, I do not intend in any way to take from you the privilege and the sole responsibility of determining these facts, because all facts are solely within your power of determination—I say, there is evidence, that there was such a division in this Socialist Party, whereby some members of the party formed what was called the Left Wing, which had a meeting here in the City of New York, called a conference, at which was adopted a communist program and a program of the Left Wing; that the defendant attended that meeting, that he was appointed on their national council; that before he was admitted to membership in the Left Wing, he signed a card stating that he hereby subscribe to the manifesto and program of the Left Wing Section of the Socialist Party; that thereafter this paper, the Revolutionary Age, was acquired; that the defendant was the business manager, and it is conceded that it was the national organ of the Left Wing. It is also conceded that he was sent by the Left Wing of Greater New York, to different parts of New York State to speak to Socialist Party branches about the principles of the Left Wing, and advocated their adoption.

Bearing in mind what I have charged you at the request of the defendant, in regard to the necessity of taking the article in question together and considering it together, and also that the common meaning of words is to be accepted, and where words of uncommon significance are used, which belong to any special domain of learning, they are to be read and understood in accordance with the entire body of learning, or science, and that it is to be assumed that those who are interested or concerned with the particular article are likewise more or less informed as to this special body of learning in general, and bearing in mind that this is by the concession, the organ of this particular organization known as the Left Wing, and bearing in mind that some 16,000 were printed and that there was general distribution of it, it becomes necessary then for you to address yourselves to an examination of the article itself to find out what meaning there is to any unusual words contained in the article so that you may properly weigh and consider the effect and force and meaning of the article itself.

In the application for membership made by the defendant, according to the concession, he subscribes to the manifesto and program of the Left Wing Section of the Socialist Party. The article itself is headed "The Left Wing Manifesto." What is a manifesto? A manifesto is defined to be "a public declaration as of a sovereign or government, or of any person or body of persons making known certain intentions or proclaiming certain opinions and motives in reference to some act or course of conduct done or contemplated. In general, a proclamation." Is the definition of the article itself in harmony with the claim that the article is only an essay, based upon alleged historical facts, and with a prophecy of future possibilities?

Then throughout the article you will find another word which probably to the ordinary reader would have no very clear meaning,—the word "proletariat."

"Proletariat" is defined in the Century Dictionary as "the class of wage workers dependent for support on daily or casual employment, the lowest and poorest class in the community. In Woolsey on Communism and Socialism it is described thus: "The proletariat, as the agitators delighted to call the standing class of the operatives; meaning by this Roman term for the lowest class in that republic, those who had only hands to work with, and no laid up capital." In Ray "On Contemporary Socialism" the word is thus used. "The socialistic doctrines had, in the west of Europe, been spread among the proletariat, the large class of society who had no property, and no stable source of income, no steady employment, and no sure hope for to-morrow.

Throughout the article you will also find a reference to the intervening condition that was to arise after the annihilation of the state, called the dictatorship of the proletariat. Again a reference to a Roman expression as to a dictator. What is a dictator? And thereby, what is a dictatorship? A dictator is defined to be 'one in whom is vested supreme authority in any line. One who prescribes for others authoritatively.' In the days of Rome, the dictator was an individual with supreme authority for a limited period of time, originally



about six months, later on some dictatorships extended for a longer period, until in the time of Caesar, he declared himself a perpetual dictator.

In contradistinction to the proletariat as used in this article, you will find the expression the bourgeois or the bourgeoisie, an expression taken from the French, and appropriated or adopted—because I do not like to use the word appropriated in that sense—and adopted into their method of speech to describe those other than the proletariat. In the original derivation it means what we would term rather the middle class.

Again there are certain words used frequently throughout the article which have a more generally known meaning. Frequently throughout the article you will find the word "militant" and while it may hardly be necessary, the dictionary definition of "militant" may be important for you to consider in determining the true meaning and purpose of the article. "Militant" is defined in the dictionary to be "fighting, warring, engaging in warfare, pertaining to warfare and conflict." And at the end of the article you will also find a word which is not in general use, the word "expropriate." The Century Dictionary defines "expropriate" as, first, "to hold no longer as one's own; to disengage from appropriation, to give up a claim to the exclusive property of." The secondary definition in the Century Dictionary is "to take or condemn for public use by the right of eminent domain, thus divesting the title of the private owner." Third, "to dispossess, exclude in general." Taking the definition of "disengage from appropriation," we look for the definition of "appropriate." We find it is "to make one's own; to take to one's self in exclusion of others; to claim or use, as by an exclusive right; in general, to take for any use; to put to use." So that expropriation means to take from some one who has appropriated.

I think those are definitions of most of the words as to which there might be some doubt in your mind as to their meaning.

The duty now rests upon you to determine whether this article is simply historical and prophetic, in the nature of an essay, as claimed by counsel in his summing up, or whether it is what its title indicates, a manifesto, making known certain intentions or proclaiming certain opinions and motives in reference to some act or course of conduct done or contemplated, and does it contain advocacy or advice or teach that it is either a duty or a necessity or proper to overthrow organized government by force or violence or unlawful means.

You must read the article. You must determine for yourselves what was the intent and the purpose of the article. All through the article you will find expressions in regard to the destruction of the state. You will find references to the claim that the destruction of the state cannot be accomplished by parliamentary methods, you will find expressions as to how the dictatorship of the proletariat can be accomplished, you will find references to the task of the dictatorship of the proletariat, and the measures to accomplish that task.

Are those the mere expressions of theories, or does the article teach the necessity or the propriety of overthrowing organized government, because under the statute, the teaching, the advising the advocating

of either a duty, a necessity or a propriety of overthrowing organized government is criminal if the method of overthrow is by force or violence or unlawful means.

In this organized government there is a lawful means to overthrow it, the means provided in the constitution, the means recognized by law, the means which do not in any way violate the law of the land. If means advocated, advised, or taught for the overthrow of organized government are other than those recognized by law, they are unlawful, and under the statute of this state, the teaching of such a doctrine is a crime.

Reference is made in the article to what is referred to as "mass action," and "the general strike," and the article contains a reference to something as "a strike developing which verged on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent. The strike workers trying to usurp functions of municipal government, as in the Seattle and Winnipeg. The mass struggle of the proletariat is coming into being." You have heard the evidence of what did occur in Winnipeg. Was that a violation of law? Strikes in themselves are not a violation of law. But the statutes of this state provide clearly just what action of laboring men is permitted. The statutes of this state provide that if two or more persons conspire to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion of obstruction of justice, or of the due administration of the laws, each of them is guilty of a misdemeanor. Our statute further provides that the ordinary and peaceable assembling or co-operation of persons employed in any calling, trade, or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate is not a conspiracy.

Does this article teach, advise, or advocate that the overthrow of government is to be accomplished by the action of two or more persons to do something or to commit an act injurious to the public health, or to commit an act injurious to trade or commerce? Does it teach, advise or advocate that the rights of propriety, of ownership of property, which under the laws of this state is recognized, shall be taken away, and that the property shall be taken without compensation? Under the laws of this government private property cannot be taken by the state except for certain purposes, and then upon giving compensation to the owner. Private property belonging to one person shall not be taken by another without his consent, except the crime of larceny is committed. Does this article teach, advise or advocate the necessity or the propriety of doing an act injurious to trade and commerce, for the purpose of overthrowing government? The language of the article in one place is "the expropriation and nationalization of large organizations of capital. Expropriation proceeds without compensation, as 'buying out' the capitalists is a repudiation of the tasks of the revolution." Does it advise, advocate or teach the propriety of doing such a thing to accomplish the purpose of the overthrow of government? It also says "Repudiation of national debts and the financial obligations of the old system." Does that mean an act injurious to trade or commerce?

Assume that you find that such acts as are referred to, are violations of existing law, the mere statement that such acts might accomplish a purpose, or that people had said that such acts would accomplish a purpose, would not constitute this crime. There must be a teaching and advising and advocacy of employing such acts, assuming that you find they are unlawful, and that they are to be employed for the purpose of overthrowing government.

Is this article solely historical, analytical, declaratory, and not advisory or intended to advise others to do these very acts for the purpose of overthrowing the government? Is there anything in the article which means that the title of "Manifesto" means, that it is a declaration making known certain intentions and proclaiming certain motives in reference to some act or course of conduct done or contemplated? Is it purely impersonal, or is it directed to the methods of the Left Wing of the Socialist Party? And does it refer to these acts as either duties or necessities or proper?

Under the heading of "Problems of American Socialism" the article states, "Now all-mighty and supreme capitalism in the United States must meet the crisis in the days to come. These conditions modify our immediate task." Does that mean anything? What is the natural meaning of the words "our task," and who are the persons included in the word "our?" In another place it is stated: "They modify our immediate task, but do not alter its general character. This is not the moment of revolution, but it is the moment of revolutionary struggle." A little further down in the last column of the eighth page, and again still under the heading "Problems of American Socialism," the article states: "But there is a more vital tendency, the tendency of the workers to initiate mass strike—strikes which are equally a revolt against the bureaucracy in the unions and against the employers. These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary socialism must use these mass industrial revolts to broaden the strike, to make it general and military; use the strikes for political objectives, and finally, develop the mass political strike against capitalism and the state. Revolutionary socialism must base itself on the mass struggle of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of socialism and the proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary socialism. Our task is to encourage the militant mass movement in the A. F. of L."

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And the beginning of the next paragraph "Our task moreover is to articulate and organize the mass of the unorganized industrial proletariat which constitutes the basis for a militant socialism." Toward the end of the article, after referring to the Communist International and the so-called treason of the Second International at Basle, which the article states represented the old dominant moderate socialism, it proceeds to say, "The Communist International issues its challenge to the conscious virile elements of the proletariat, calling them to the final struggle against capitalism on

the basis of the revolutionary epoch of Imperialism. The acceptance of the Communist International means accepting the fundamentals of revolutionary socialism as decisive in our activity." Is that historically prophetic and in the nature of an essay, or is it the teaching, advising and advocating of the principles of the Communist International as determinative of our activity, meaning, as used there, the activity of the Left Wing of the Socialist Party? Their program contains as its first paragraph, "We favor international alliance of the Socialist movement of the United States only with the Communist groups of other countries, such as the Bolsheviki of Russia, the Spartacans of Germany, and so forth, according to the program of communism as above outlined." What is the program of communism as above outlined? The article above that, is the Communist Program, and they state there, "The Left Wing Program is implied within the terms of the program of the Communist International. We therefore outline, as the controlling propositions of our programs, the main principle of communism, as follows." Does this teach, advise or advocate that such methods are proper or are necessary?

The concluding language of the article is: "The revolutionary epoch of the final struggle against Capitalism may last years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. The old order is in decay. Civilization is in collapse. The proletarian revolution and the communist reconstruction of society—the struggle for these—is now indispensable. This is the message of the Communist International to the workers of the world. The Communist International calls the proletariat of the world to the final struggle."

I have not attempted to read the entire article to you. Most of the particular matters that I have read to you, were also read to you by counsel for the defendant. This last was read to you by counsel for the defendant.

What is the fair meaning and intendment of the article? That is for you to determine. If you have a reasonable doubt that that article did teach, advocate or advise the duty or the necessity or the propriety of using unlawful means for the overthrow of organized government, the defendant is entitled to an acquittal. If, on the other hand, as reasonable men, you are satisfied beyond a reasonable doubt that the purpose and intent of that article was to advise, teach and advocate, and that it did advise, teach and advocate the duty, necessity or the propriety of overthrowing organized government by means contrary to the laws of this government, or by means of force or violence, then it is equally your duty to find the defendant guilty. It is not necessary nor should it be expected, that person who should advocate, who did advocate or advise or teach the overthrow of the government by force or violence or by unlawful means should point out with particularity the exact method of force and violence that he intended to use, or the exact time

when he intended to put his purpose into effect, any more than a person who announces or makes the determinations in his own mind of a purpose to commit murder should warn his victim of the time and place and method by which the murder was to be committed. That is not to be expected.

I decline to charge request number two further than I have charged. I decline to charge request number three, further than I have charged. I will charge request number five with serious doubts, but I charge it. I charge you, gentlemen, at the request of the defendant, that unlawful means as used in this charge does not include any means of action which you may disapprove, or any means which in your judgment ought to be declared unlawful, but only those means which now constitute criminal offenses under the laws of this state. In other words, just because you think that a means to be employed is not right or that a means to be employed you think should be made unlawful, is not sufficient, but it must be a means which is unlawful under the laws of this state, and I have explained to you that under the laws of this state it is unlawful to take private property without compensation, and under the laws of this state it is unlawful to conspire to injure the public health or to injure trade or commerce.

I refuse to charge request number six. I refuse to charge request number seven. [The defendant requests me to charge his eighth request: "Unless you find that the defendant intentionally put into writing language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the first count, of the indictment." I decline to charge that as requested, because of the uncertainty and indefiniteness of the language. "Put into writing." He may be equally responsible if he never touched a pencil or pen to paper. I also refuse to charge it because it says "language calculated to incite certain persons." It makes no difference whether the language was calculated to incite, if the language did advise, advocate and teach the doctrine. If a man tries to do it and his powers of expression are not such as will incite the person to whom he addresses his remarks, that is not his fault. He commits a crime when he advises it. If it is the purpose of the request that the defendant must have done it intentionally, I charge that if he accidentally advocated, advised or taught a doctrine, that would not be a crime. And as to the intent of the act, of the speech, or of the writing—when I say writing, it includes printing—I charge that unless you find that the defendant intentionally advised, advocated or taught by writing, the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by unlawful means, you must find the defendant not guilty under the first count. I refuse to charge the ninth request as requested. I charge you that unless you find that the defendant intentionally published or issued or circulated with knowledge of the nature of the publication, printed matter in any form tending or advocating, advising or teaching the doctrine that organized government should

be overthrown by force, violence or any unlawful means, you must find the defendant not guilty under the second count of the indictment. I refuse to charge the fifteenth request.

Are there any other requests?

Mr. Darrow: Your Honor, I fancy that the refusal will show on the face of the refused instructions.

The Court: Yes. And to each refusal to charge, the defendant takes an exception?

Mr. Darrow: Yes. I presume I should call your Honor's attention to those matters where we except to the language of the court and the instructions. I would like to except to that portion of the court's charge where he instructs the jury that the question of free speech is not involved, which was in the early part of the charge.

I want to further except to the reading by the court of the language of Justice McLaughlin in an opinion rendered in the Appellate Division, and Judge Vann in the Court of Appeals.

And I except to the Court's definition of the verb "advocate," taken from the Century Dictionary.

The Court: Have you any other recognized definition of the verb that you desire charged? I will charge it.

Mr. Darrow: I have not fully considered that, but I think the dictionary definition as given does not cover it. I think it means urging people to adopt, and carry out some specific program defined and specified, and the time being obvious from the reading of the program. It is the urging to carry it out.

The Court: I will charge it in that language.

Mr. Darrow: Well, I also want my exception to the definition as given by the Court.

The Court: Yes. You have excepted to the definition as I have given and I asked you to define it yourself, and I charge your definition.

Mr. Darrow: And you make my definition a part of the instruction?

The Court: Yes, I do.

Mr. Darrow: I want to except to the remarks of the Court in saying that the jury must read and ascertain this for themselves, and could not be bound by the remarks of counsel for the defendant who read such parts of it as he saw fit to read.

The Court: I should have added that you must not be bound by the arguments of counsel in relation to the meaning of the paper except as the statement of counsel in his argument agrees with your own conclusion after examining it.

Mr. Darrow: Your Honor referred especially to what I read to them. It was not to my comments on it, as I recall it. That I would have chosen portions to read, would be no fair criterion.

The Court: I did not say that would be no fair criterion.

Mr. Darrow: But you said they must not take that as the article. There was no reference made to the portion read by the District Attorney.

The Court: That also applies to the portions read by the District Attorney. I think he did not read specifically any portions of the article. He rather purported to quote a few words from the article.



Of course the same reference to the fact that you must not confine yourselves to the portions of the articles read by either side, I should have stated, but you must determine the question from your examination of the entire article yourselves.

Mr. Darrow: I want to take an exception to the reading and the comments of the Court concerning the constitution and program of the Socialist Party as introduced in evidence, and especially the comments with reference to its attitude on war. That was the Socialist Party.

I except to the definition of the Court given to the jury of the word "manifesto," as the Court says coming from the Century Dictionary, as I recall.

And I except to the definition of the word "proletariat," as given by the Court.

I except to the definition of the word "dictatorship" as given by the Court, and I except to the definition of the word "militant," as given by the Court; and I except to the definition of "expropriate" as given by the Court.

The Court: In connection with the definition of the word "expropriate", it is but fair to state that the definition given by the Court was the one handed up to him by counsel for the defendant yesterday.

Mr. Darrow: I think that is true your Honor.

The Court: I know it is true.

Mr. Darrow: I want to say this about it. I looked that definition up in the Standard Dictionary, and I did pass it to the Court, but I believe that that is not the full meaning. However, if the Court thinks I ought to be bound by it, I will withdraw that exception.

The Court: You are entitled to take your exception.

Mr. Darrow: I would not except to anything I said to the Court about it. I did pass it to the Court. But I think there is a broader definition somewhere else. I am not quite sure, your Honor, but I want to except to the definition of the Court of the words "bourgeois" and "bourgeoisie." I am not absolutely sure that your Honor defined it, but my associate says you did.

The Court: I said it was derived from the French.

Mr. Recht: You stated it was the middle class.

The Court: Have you any definition of the word "bourgeois" that you desire me to charge the jury? If so, I will charge it?

Mr. Recht: I think it ought to be taken in context with the terminology of the Marxian philosophy.

The Court: Give me any definition of the word "bourgeois" that is recognized, and I will charge it. Do you claim that it means anything else than the opposite class of society from the proletariat?

Mr. Recht: It means the capitalistic class of society.

The Court: That is, that class of society which has property, as against the proletariat, which is the class of society which has no property?

Mr. Darrow: Your Honor, we don't think these are the exact definitions.

Mr. Rorke: I want to object to argument. I am willing to have a definition——

The Court: Mr. District Attorney, the Court will protect itself in its own charge.

Mr. Rorke: The People are interested in an argument that is made after the time for argument has ceased.

The Court: This is not an argument. Leave it as your associate Mr. Recht suggested, that it is the capitalistic class. The bourgeois, it is your contention, as used in this article, is the capitalistic class. Is that right?

Mr. Darrow: That is about right. That is what we will take as the definition.

The Court: I did not attempt to define it. I think I said it had been appropriated by these writers, the word being a French word, the bourgeois being the class in France which would be most generally understood by us as the middle class.

Mr. Darrow: I except to the comments of the Court as to the meaning of the word "appropriate" and its definition, and I except to the comments of the Court in speaking of the word "manifesto", as to whether it is what its title indicates, describing it from the definition your Honor gave. And I except to the definition of your Honor in reference to this crime, that it consists of teaching or advocating the duty, necessity or propriety of overthrowing the Government. On the ground it should be more than that.

The Court: Possibly *is* should, but the fact is that that is the language of our statute.

Mr. Darrow: When I say "ought" I must mean under the statute.

The Court: I have used the very language of the statute.

Mr. Darrow: I want to except to the language of the Court in substance that all through the article you told the jury they would find expressions as to the destruction of the state, and reference that only the proletarian class would count, and expressions as to the dictatorship of the proletariat, in connection with the definitions already given by the Court of the words.

I also except to the language of the Court in substance that any method excepting the means provided by the Constitution and the laws, were unlawful.

The Court: That was modified by my charge of your fifth request.

Mr. Darrow: Well, I fancy—If it is—you will recognize that I have taken this down just as I heard the charge. Then the exception would not lie, but I am entitled to find out, I take it.

The Court: Certainly.

Mr. Darrow: I want to except to the language of the Court with reference to his instructions on mass action and general strikes, and especially with his language and calling the attention of the jury to what happened in Winnipeg with reference to its bearing on mass action and general strikes.

I except to the language of the Court in reference to his construction of the statute of the state as to what actions of labor unions may be excluded from the conspiracy act, on the statutory offense, which your Honor read, which I take it is a conspiracy act, and the



language in effect that unless it was included in that exclusion, any act not excluded was an unlawful act.

The Court: I did not so charge. Any conspiracy of two or more persons, or any act of two or more persons to commit an act injurious to the public health or to trade or commerce, is a crime within this state.

Mr. Darrow: Your Honor, I think I can quote that a little better, so that I can take advantage of it, if there is any to take.

The Court: I charge the jury that there was a specific provision in this state, that the gathering together, the orderly and peaceable assembling or cooperation of persons, employed in any calling, trade or handicraft for the purpose of obtaining advance in the rate of wages or compensation, or of maintaining it, is not a conspiracy.

Mr. Darrow: Let me put it in another way.

The Court: I will further charge the jury that the orderly and peaceable assembling or cooperation of persons employed in any calling, trade or handicraft for the purpose of bettering their own living conditions is not a conspiracy.

Mr. Darrow: I want to take an exception to the idea of that statute having anything to do with this case. I will put it that way. I except to the language of the Court with reference to the conspiracy statute on the ground that the statute has nothing to do with any construction of this case, especially that part of it which refers to the public health and trade and commerce. I think that will cover it. And after that, the orderly and decent and peaceable acts. I think the word "decent" crept in.

The Court: If that word crept in at that time, I will withdraw it. I am perfectly sure it was not there.

Mr. Darrow: I am willing to have you do that, your Honor.

The Court: The word is "peaceable."

Mr. Darrow: I except to the Court's instructions that under the law, private property can only be taken by giving compensation, and in effect that it would be illegal for the defendant or those associated with him, and that it would be larceny for the defendant to advocate the taking of private property without compensation.

The Court: I did not say it would be larceny to advocate. I said if an individual took private property from another without his consent, it would be larceny, and under our laws, the state or a public corporation or a quasi-public corporation has no right to take the property of an individual without compensation.

Mr. Darrow: Your Honor states that law correctly, but my view of this matter is somewhat different than we discussed. I want to save it for the record. I could state it more clearly, but counsel would probably object to it. Probably I had better re-state my exception. I except to the language of the Court with reference to the taking of private property without compensation under the state and federal constitution, and that such taking would be unlawful.

I except to any application of this to the facts in this case, and also to the statement in connection therewith, that if one took the private property of another without compensation, it would constitute larceny.

The Court: From an individual, without his consent, would be larceny.

Mr. Darrow: Make it "an individual." And also, without his consent.

And I object to the several quotations of the Court from the manifesto, read to the jury, with the instructions to them that it was their business to find out whether this did constitute taking property without compensation. And also object to the statement of the Court in reference to the repudiation of all debts, and of the public debt, that it would mean the taking of private property without compensation, and would be illegal and injurious to trade and commerce. Of course within the meaning of the law.

I object to the statement of the Court that the jury should determine whether the article was solely an analysis of historical matters, and matters of fact and of prophecy, or whether there was nothing in it which showed that it meant what its title "manifesto" meant. I cannot give the exact language.

The Court: If I used the word "solely," I will modify it by substituting for that the word "merely."

Mr. Darrow: Then I will save my exception to the word "merely," then. The jury of course understands that the word "solely" is modified?

The Court: Yes.

Mr Darrow: Then I will take the same exception to the word "merely." I except to the language of the Court under the discussion of Problems of American Socialism, and the Court's special reference to the statement of "our task," and an instruction to the jury to ascertain or find out what the word "our" in connection with "task" means. And I except also to the direction of the Court, to the instruction of the Court to the portions of the article and the comments thereon in reference to mass strikes which must be broadened, and so forth until they took the form of action against the government.

The Court: I presume you refer to the sentence which I read, "Revolutionary socialism must use these mass industrial revolts to broaden the strikes."

Mr. Darrow: It was under that heading, your Honor. I except to the remarks of the Court with respect to the language at the end of the manifesto so-called, in substance about the party issuing its challenge and calling to the proletariat for the final struggle with capitalism. And as to your Honor's suggestion as to whether that was teaching or whether it was prophecy and rhetoric.

The Court: I would not call it a suggestion. I would call it rather a query.

Mr. Darrow: Well, query. It was calling the attention of the jury to it, anyway. I just want to take an exception to the language, whatever it shows. Then your Honor turned back to the first, and went to the part I have just discussed, I want to except to the Court's reading from what I believe was probably about the first in this manifesto, but read toward the last, of your instruc-

tions in reference to the association of this organization with certain groups of European groups, particularly Bolsheviki.

The Court: I read from the first paragraph of the so-called program, and also read what that paragraph referred to as the matter above, called the Communist Program.

Mr. Darrow: I except as to what the Court read from the program of the Left Wing and the comments thereon. I except to the Court's further reading of the last portion of this manifesto beginning, I believe, in substance, "The old order is in decay, and the struggle is on for the new." This message that calls the proletariat of the world, and so forth,—with a query or suggestion, whatever it amounts to, as to whether that meant the action, persuading, advising or whether it was rhetorical or prophetic, whatever words your Honor used. That can be determined after it is written out.

I want to take an exception to the language of the Court that it is not necessary that any writing or speaking should point out the exact method that the thing should be accomplished, or the time, and coupled with that suggestion, the language of the Court and its illustration that you could as well expect that a murderer would tell his victim when and how he was going to kill him.

We have already an exception to the special requests you refused and the modifications, where they are modified?

The Court: Certainly.

Mr. Darrow: My associate wants to take an exception to the definition of the word "intent."

Mr. Recht: Your Honor stated that the contradistinction between intent and the thing was a mere accident. Your Honor said "accidentally to avoid a doctrine." That was the substance as I got it.

The Court: In commenting on your ninth request, which I declined to charge in the language presented, I did charge that unless they found that the defendant intentionally published or issued or circulated. I said, of course if it were done accidentally, it would not constitute the offense, but that if it was done,—that intentionally meant with intent to do it, and if he did an act which would necessarily result in the thing being done, such as the publication and distribution, he must be held responsible for the consequences of his act.

Mr. Darrow: Whatever it is, it is already covered?

The Court: Yes. Is that all?

Mr. Darrow: Yes.

The Court: I understand counsel and the defendant have agreed that the jury may take copies of this edition, the Revolutionary Age, with the parts marked out that are not in evidence, or that are not to be considered by the jury?

Mr. Darrow: Yes. They are indicated in some way.

The Court: The only articles that I understand the jury are to consider are the Communist Program on page 10, the Program of the Left Wing on page 10, and part of a column on page 13, and the Left Wing Manifesto printed on pages 6, 7, 8, 14 and 15.

Mr. Rorke: And the box at the head of page 2.

The Court: Yes, on the editorial page, which is page 2, giving the names of the committee, and the business address, and so forth.

The Court: Now, gentlemen of the jury, I believe that the Court has fully and sufficiently instructed you upon the principles of law which you are to apply in determining the facts in this case, and has stated clearly to you the offense with which the defendant is charged, and the necessary elements of proof to be presented to make out that offense. The question for you to determine is the question of fact as to whether the acts of the defendant in connection with the publication of this article constitutes the offense charged against him. Whether the article itself does teach, advocate or advise the duty, necessity or propriety of overthrowing organized government by force or violence, or by means which are contrary to the laws of the State and of the country.

The case has been fully presented. The final determination of that question of fact is with you. The responsibility now rests entirely with you. Consider it thoughtfully, honestly, conscientiously. If you have a reasonable doubt as to the guilt of the defendant, that reasonable doubt is his property and he is entitled to an acquittal. If you have no reasonable doubt of the guilt of the defendant, your course is equally clear, and your verdict should be a verdict of guilty. You may retire.

The Foreman of the Jury: Your Honor, may I ask a question before we go?

The Court: Certainly.

The Foreman of the Jury: Will you kindly define the word "essay" to the jury? I think that is liable to come up.

The Court: The word "essay" means a writing covering generally a particular subject. What you possibly have in your mind is, where an essay may be in the nature of advocacy or advice or teaching— It may. Any written article bearing upon a subject is an essay.

Juror No. 9: May we know what the penalty is prescribed by law?

The Court: You have no interest whatever in the penalty. No one knows what the penalty will be until the question of the imposition of penalty arises. There is a maximum penalty which may be imposed. With that, you have no concern, and a juror who permits any consideration of the extent of the penalty to influence his determination upon the ultimate fact of guilt or innocence commits a crime against the state and violates his oath. You must decide the concrete facts upon the evidence. The jury have no interest whatever in the imposition of punishment. That rests solely in the Court. You may retire.

(The jury retires.)

The defendant's requests for instructions, as submitted were as follows:

1. You are instructed that a statement or analysis of social and economic facts and of historical incidents, accompanied by prophecy as to the future course of events with reference to the industrial system and the state, or political organization of society, does not constitute the offense charged by either of the three counts of the indictments.

2. Advocating, advising or teaching the duty, necessity or propriety of overthrowing organized government by force or violence, or by any unlawful means, within the meaning of the criminal anarchy law, means the advocacy, teaching or advising, or the publication of articles advising, teaching or advocating some definite and immediate act or acts of force or violence, or of other definite and immediate unlawful acts directed toward the overthrowing of organized government.

3. Any person, under the laws of the State of New York, has the right to advocate the complete change of the structure and policies of government, or to advocate the abolition of all government, unless that advocacy includes also the teaching or advising of the duty, necessity or propriety of doing some immediate and definite act or acts which constitute force, violence, or other unlawful means.

4. "Unlawful means," as used in this charge, includes only conduct of the same character or species as force and violence.

5. "Unlawful means," as used in this charge, does not include any means of action which you may disapprove, or any means which in your judgment ought to be declared unlawful, but only those means which now constitute criminal offenses under the laws of this State.

6. "Force or violence," within the meaning of the criminal anarchy statute, means direct, definite and immediate acts of destruction against persons or property.

7. The right to strike and the lawful character of a strike is not determinable by the alleged or purported purposes or aims of the strike. A strike to change the policies or form of government is not of itself unlawful.

8. Unless you find that the defendant intentionally put into writing language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, within the object of overthrowing organized government, you must find the defendant not guilty under the first count of the indictment.

9. Unless you find that the defendant intentionally published or issued, or circulated with knowledge of the nature of the publication, language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the second count of the indictment.

10. Words are to be construed according to their obvious common understanding and not according to conjectured secret intentions. If there is a secret or covert meaning it must be known to those addressed.

Language is not to be forced or tortured in order to bring it within the prohibition of the law.

11. The fact that supersensitive persons, with morbid imaginations, may be able by reading between the lines of an article to discover some meaning which brings it within the prohibitions of the law is not sufficient. Language is to be taken in its plain and ordinary sense.

12. Language which apparently belongs to a special domain of learning, or to a special science or purported science, is to be read and understood in accordance with the entire body of learning or science. It is to be assumed that those who are interested or concerned with the particular article under inquiry are likewise interested and more or less informed as to this special body of learning in general.

13. An article or writing, such as the publication incorporated in each of the three counts of the indictment in this case, must be taken as a whole, each part being understood in relation to the rest of the article.

14. Under all counts of the indictment against the defendant the language must be confined to the article charged in the indictment, to wit, the Left Wing Manifesto, and defendant cannot be found guilty for any other writing or statement.

15. The doctrine that organized government should be overthrown by force, violence or any unlawful means is the doctrine that all government should be overthrown. It does not include the doctrine or advocacy of a change of control of government from one class or group to another class or group, nor the doctrine that this change of control of government should be accompanied by drastic or complete change of the forms and policies of the government."

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, being possessed of the record upon a remittitur from the Court of Appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York, plaintiff, and Benjamin Gitlow, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was



drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Benjamin Gitlow, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the seventh day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

Allowed by Wm. H. Taft, Chief Justice of the United States.

[Endorsement omitted.]

#### **PETITION FOR WRIT OF ERROR AND ORDER OF MR. JUSTICE BRANDEIS THEREON.**

[Omitted, Printed P. 137.]

[Endorsement omitted.]

#### **ASSIGNMENT OF ERRORS.**

[Omitted, Printed P. 139.]

[Endorsement omitted.]

#### **BOND ON WRIT OF ERROR.**

Know all men by these presents, That we, Benjamin Gitlow as principal and the National Surety Company a corporation organized under the laws of the State of New York of 115 Broadway, New York, N. Y. as surety are held and firmly bound unto the People of the State of New York in the full and just sum of five hundred (\$500) dollars, to be paid to the said People of the State of New York, its attorneys or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators,

successors and assigns, jointly and generally by these presents. Sealed with our seals and dated this 5th day of December in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at an Extraordinary Trial Term of the Supreme Court of the State of New York held in and for the County of New York, in a prosecution under an indictment in said court by the People of the State of New York against Benjamin Gitlow, defendant, a judgment was rendered against the said Benjamin Gitlow finding him guilty of criminal anarchy and sentencing him to serve not less than five nor more than ten years in State's Prison, and the said judgment having been duly affirmed on appeals by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, and the Court of Appeals of the State of New York, and the judgment of affirmance of the said Court of Appeals duly remitted to said Supreme Court of the State of New York and an order or judgment duly entered in said Supreme Court making the said judgment of the Court of Appeals the judgment of said Supreme Court; and the said Benjamin Gitlow having obtained a writ of error from the Supreme Court of the United States to reverse the judgment aforesaid,

Now, the condition of the above obligation is such, That if the said Benjamin Gitlow shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue. Benjamin Gitlow, by Walter Nelles, His Attorney. [Seal.] National Surety Company, by Roy B. Davis, Res. Vice-President. Attest: M. T. Williams, Res. Asst. Secretary.

The foregoing bond is hereby approved. W. H. Taft, Chief Justice of the United States. December 7th, 1922.

STATE OF NEW YORK,

*County of New York, ss:*

On this 6th day of December, 1922, before me personally appeared Roy B. Davis, Resident Vice-President of the National Surety Company with whom I am personally acquainted, who, being by me duly sworn, say that he resides in the County of New York that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like order. And said Roy B. Davis further said that he is acquainted with M. T. Williams and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said M. T. Williams subscribed to the said instrument is in the genuine handwriting of the said M. T. Williams and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 33 of the Laws of the State of New York for the year 1909 constituting



Chapter 28 of the Consolidated Laws of the State of New York known as the Insurance Law, as amended by Chapter 182 of the Laws of the State of New York for the year 1913, issued to the National Surety Company his certificate that said Company is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guaranties and other obligations required or permitted by law; and that such certificate has not been revoked. Pasquale F. Spani. Pasquale F. Spani, Notary Public, New York County, No. 1163. [Seal of Pasquale F. Spani, Notary Public, New York County.] New York County Register's No. 3280A. Bronx County Clerk's No. 201. Register's No. 348. My Commission Expires March 31, 1923.

*Copy of By-Law.*

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

Section 1. Signatures Required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "SEAL" or the letters "L. S." opposite the signature of such Attorneys-in-Fact, as the case may be.

STATE OF NEW YORK,  
*County of New York, ss:*

I, M. T. Williams, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Laws with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of Article XIII, Section 1 of said original By-Law:

Given under my hand and seal of the Company, in the County of New York. This 6th day of December, 1922. M. T. Williams, Resident Assistant Secretary.

UNITED STATES OF AMERICA, ss:

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, wherein Benjamin Gitlow is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this seventh day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. H. Taft, Chief Justice of the United States.

[Endorsed:] Copy of within paper Received Dec. 8, 1922. Chas D. Newton, Attorney General. Copy received. Joab H. Banton, D. A., per E. J. Horan.

[Title omitted.]

### ORDER ALLOWING WRIT OF ERROR.

The writ of error allowed herein having been duly lodged with the Clerk of the Supreme Court of the State of New York, County of New York, and the citation served on the defendant-in-error, it is now

Ordered, that said writ of error operate as a supersedeas and that the plaintiff-in-error be admitted to bail upon furnishing a bond in the penal sum of seven thousand five hundred (\$7500) dollars conditioned according to law, to be approved by any Justice of the Supreme Court of the State of New York.

Dated, Washington, D. C., December 12th, 1922. Wm. H. Taft, Chief Justice of the United States.

[Endorsement omitted.]

[Title omitted.]

### PRAECIPE.

Please take notice that for the purpose of reducing the size of the transcript of the record on writ of error herein, pursuant to Rule 8 of the Supreme Court of the United States, the plaintiff-in-error indicates the following portions of the record to be incorporated into and to constitute the transcript of the record on said writ of error:

1. Writ of error.
2. The Citation.
3. Bond on writ of error.
4. Copy of the order of December 12, 1922, making the writ of error a supersedeas.
5. The printed papers on application for writ of error, including
  - a. Notice of application;
  - b. Supplemental petition;
  - c. Indictment—counts 1 and 2;
  - d. Order of affirmance by Appellate Division;
  - e. Opinion of Appellate Division;
  - f. Judgment of affirmance and remittitur in the Court of Appeals;
  - g. Opinions in the Court of Appeals;
  - h. Order of the Supreme Court on the remittitur;
  - i. Order of the Court of Appeals amending the remittitur;
  - j. Petition for writ of error;
  - k. Order of Mr. Justice Brandeis referring application to the full court;
  - l. Assignment of errors.
6. The evidence and proceedings on the trial as condensed in the annexed statement thereof.
7. The charge of the trial court and the defendant's exceptions thereto and requests to charge (fols. 1126-1246 of the printed case in the Court of Appeals).

8. This præcipe.

Dated, New York, December 13, 1922. Yours, etc., Walter Nelles, Attorney for Plaintiff-in-Error, 80 East 11th Street, New York City. To Charles D. Newton, Esq., Attorney General of the State of New York; Joab H. Banton, Esq., District Attorney, New York County.

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the papers indicated in the foregoing præcipe shall constitute the transcript of record on writ of error herein.

Dated, New York, December 21st, 1922. Charles D. Newton, Attorney General of the State of New York, by S. A. Berger, Special Dep. Atty. Gen.; Joab H. Banton, District Attorney, New York County, by John Caldwell Myers, A. D. A. Walter Nelles, Attorney for plaintiff-in-error.

**CONDENSED STATEMENT OF THE ENTIRE EVIDENCE  
AND PROCEEDINGS ON THE TRIAL OF BENJAMIN GIT-  
LOW BEFORE THE HON. BARTOW S. WEEKS, JUSTICE  
OF THE SUPREME COURT OF THE STATE OF NEW  
YORK, AT AN EXTRAORDINARY TRIAL TERM OF SAID  
COURT, JANUARY 21 TO FEBRUARY 5, 1920.**

Appearances: Edward Swann, Esq., District Attorney (By Alexander I. Rorke, Esq., for the People); Charles Recht, Esq., for the Defendant (Clarence Darrow, Esq., of Counsel).

A jury having been duly examined, accepted and sworn. (Fols. 23-24.)

NATHAN ELKIN, a witness produced on behalf of the people, being first duly sworn, testified as follows:

Mr. Darrow: Before taking the testimony, I want to object to all evidence under this indictment, first on the ground that the article set out shows as a matter of law that it is not in contravention of the statute, and secondly that the statute is in contravention of the State Constitution, Article — Section —, and of the Federal Constitution, Article — Section —. I will give you the exact references, if you will permit me sometime during the day. And next, that as to each and every count of the indictment, particularly counts one and two, there is an (no) allegation that the publication, or anything charged in the indictment, was directed against any government, and that it must specify before it can be a valid indictment that it was directed against some particular government. And I submit that without argument.

The Court: Motion denied on each of the grounds, and counsel takes an exception to the denial on each ground. Do you desire to say anything further? (Fols. 72-74.)

Mr. Darrow: Before we begin taking the testimony, I rather gathered from the opening statement that counsel expected to spend more or less time showing the legal responsibility of this defendant for the article published. Under the statute he is responsible for the article as it appeared. I want to say as to that, so that it may save time, that my client was the business manager and on the board of this paper, and there will be no attempt on his part to deny legal responsibility for it. He was on the board of managers, he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation.

The Court: And he was one of the committee owning the paper?

Mr. Darrow: Yes.

The Court: And was the business manager of the paper?

Mr. Darrow: Yes, sir.

The Court: And that he conducted the negotiations for its printing?

Mr. Darrow: He conducted negotiations for printing the paper regularly.

The Court: Of the 5th of July?

Mr. Darrow: The negotiations included that. The negotiations were made before.

The Court: That was the first number that he conducted negotiations for the printing?

Mr. Darrow: Yes, your Honor.

The Court: That he paid for the printing?

Mr. Darrow: As the business manager, yes.

The Court: And as one of the owners?

Mr. Darrow: Yes. On the committee. As one of the owners. (Fols. 75-83.)

The Witness: I am the Secretary of the Alpha Press at 266 Grand Street, New York City. In June, 1919, the defendant arranged with me for the printing of a weekly paper in issues of about 16,000 copies. He brought me manuscript for the first number and told me to go ahead with it, and we set it up and printed it and delivered 16,000 copies at the office at 43 West 29th Street, occupied by the officials of the Left Wing of the Socialist Party, including the defendant as business manager of the Revolutionary Age.

(A copy of this paper, the Revolutionary Age for July 5, 1919, containing the Left Wing Manifesto set forth in the indictment, was received in evidence.)

The defendant paid my bill.

I later printed and delivered and received pay for subsequent weekly issues of the Revolutionary Age during the summer of 1919. (Fols. 84-217.)

CLARENCE L. CONVERSE, a witness produced on behalf of the people, being first duly sworn, testified as follows:

The Witness: I am an inspector, Military Intelligence Division, U. S. Army. In July and August, 1919, I was a Special Agent for the Joint Legislative Committee investigating seditious activities in the State of New York. In July, 1919, I called at the Left Wing offices at 43 West 29th Street, where a young man was wrapping up copies of the Revolutionary Age, and bought several copies of the Revolutionary Age, including the issue of July 5, 1919. The defendant was in the room. (Fols. 218-243.)

BELLA GITLOW FRUCHTER, a witness produced on behalf of the people, being first duly sworn, testified as follows:

The Witness: In July, 1919, I was stenographer for my brother, the defendant, at 43 West 29th Street.

My brother was born in Elizabeth, New Jersey. He is twenty-nine years old. Our parents were born in Russia. (Fols. 359-361.)

Q. What were those premises used for at that time at 43 West 29th Street?

A. The office of the Revolutionary Age and the Headquarters of the Left Wing Section of the Socialist Party of America.

Q. What was the connection between the Revolutionary Age and the Left Wing of the Socialist Party of America?

A. It was the official organ of the Left Wing Section of the Socialist Party of America. (Fols. 361-362.)

Two boys employed there wrapped and mailed out the Revolutionary Age under the defendant's direction. They and the defendant and I occupied the same room. We sold the paper from these premises. Fraina and MacAlpine were the editors. (Fols. 312-450.)

ANNA RUBIN, a witness produced on behalf of the People, being first duly sworn, testified as follows:

The Witness: In June and July 1919 I was stenographer for Maximilian Cohen, the Executive Secretary of the Local New York Branch of the Left Wing Section of the Socialist Party, at 43 West 29th Street. The New York Left Wing was organized early in 1919. The defendant spoke at a meeting at Madison Square Garden in June, 1919, under the auspices of the Russian Federation. I think he was Chairman. (Fols. 451-509.)

FANNIE HOROVITZ, a witness produced on behalf of the people, being first duly sworn, testified as follows (fol. 510):

Q. In June, 1919, were you a member of the Left Wing of the Socialist Party?

A. I was.

Q. Will you tell us if there was a conference of delegates known as the Left Wing Conference, held in New York, between the dates June 21st and June 24th, 1919?

A. There was. (Fol. 511.)

The Court: You were the permanent secretary?

The Witness: I was. (Fol. 513.)

Q. How many delegates attended?

A. Roughly speaking, I should say about 75.

Q. Where were they from?

A. Different parts of the United States. (Fol. 516.)

Q. What was the purpose of the conference?

A. Crystalizing the sentiment against the machinery of the Socialist Party. (Fol. 517.)

Q. I will ask you what you mean to state by crystalizing the sentiment against the Socialist Party?

A. There was opposition to the machinery in the Socialist Party, that is, against those who were at the head of it, and those who were opposed to it formed what was known as the Left Wing Section of the Party. (Fol. 518.)

Mr. Rorke: I understand the defense concedes that prior to June 21st to June 24th, there had been in existence in this country, a party of nation-wide extent known as the Socialist Party, and that two factions in that party had grown up, one known as the Left Wing of the Socialist Party, and that thereafter and before June 21st, 1919, members of the Party known as the Left Wing of the Socialist Party, called a conference which was attended by delegates from most, if not all of the States of the Union, which was held in the City of New York on that day.

Mr. Darrow: From a large number of the States, your Honor. Fourteen.

The Court: Well, the number is immaterial.

Mr. Rorke: It is also conceded by the defense that during the conference, it was decided to leave the adoption of the manifesto to the National Council, which National Council had been selected by the

conference, and that after the conference the National Council caused the manifesto of the Left Wing Section of the Socialist party to be published in the Revolutionary Age July 5th, 1919 (fols. 529-531).

It is conceded by the defense that membership in the Left Wing was open only to members of the Socialist Party, which permitted aliens as well as citizens to be members (fol. 540).

It is conceded by the defense that at the Conference of the Left Wing, held June 21st to 24th, 1919, in New York County, ninety delegates from twenty different states, from large industrial centers, as New York, Boston, Philadelphia, Rochester, *Philadelphia*, Pittsburgh, Chicago, Hartford, Minneapolis, St. Paul, Duluth, Detroit, Kansas City, Cleveland, Denver and Oakland, California, were present.

It is conceded by the defense that at the conference a National Council consisting of nine members was elected, the nine members being C. E. Ruthenberg, Cleveland; Louis C. Fraina, Boston; I. E. Ferguson, Chicago; John Ballam, Boston; James Larkin, New York; Eadmonn MacAlpine, New York; Benjamin Gitlow, New York; Maximilian Cohen, New York; and Bert Wolfe, New York.

It is conceded by the defense that Louis C. Fraina was the Editor and Eadmonn MacAlpine, the Managing Editor of The Revolutionary Age.

It is conceded that The Revolutionary Age, People's Exhibit 1 in evidence, was the national organ of the Left Wing Section, Socialist Party.

It is conceded by the defense that before an applicant was admitted to membership in the Left Wing, he was required to sign a card stating that "The undersigned hereby subscribes to the manifesto and program of the Left Wing Section of the Socialist Party."

It is conceded by the defense that Gitlow signed such a card. That Gitlow was sent by the Left Wing of the Socialist Party of Greater New York, to different parts of New York State to speak to Socialist Party branches about the principles of the Left Wing, and advocated their adoption. (Fols. 540-544.)

JOSEPH A. ZINMAN, a witness produced on behalf of the people, being first duly sworn, testified as follows:

The Witness: I took stenographic notes of the proceedings of the National Left Wing Conference held at New York in June, 1919. The defendant was present. There was discussion of a Manifesto and Program. (Fols. 553-578.)

ROSE PASTOR STOKES, a witness produced on behalf of the People, being first duly sworn, testified as follows:

The Witness: I was treasurer of the Left Wing of the Socialist Party. I made speeches for the Left Wing. I attended the Conference in June. I have a general impression that a manifesto was adopted. (Fols. 578-648.)



FURRY FERGUSON MONTAGUE, a barrister of Winnipeg, Canada, testified, over objection and exception by defendant's counsel, that there was an extensive strike at Winnipeg commencing May 15, 1919, during which the production and supply of necessities, transportation, postal and telegraphic communication, and fire and sanitary protection were suspended or seriously curtailed. (Fols. 649-762.)

Two statements of principles adopted by the Left Wing Conference similar to those contained in the Left Wing Manifesto and part of the Constitution of the Socialist Party (repeated in the Court's charge) were received in evidence and read to the jury. (Fols. 762-796.)

Mr. Rorke: The People rest.

Mr. Darrow: We rest. I want to make the usual motion to the court to instruct the jury to return a verdict of not guilty in this case.

The Court: Motion denied.

Mr. Darrow: Based on the grounds stated in the first objection to evidence in this case.

The Court: Motion denied.

Mr. Darrow: Exception. I want to make a motion that the court dismiss the indictment, upon the grounds heretofore stated, that the indictment does not charge an offense, and also upon the ground that the evidence in this case does not show an offense, and I further ask the court to direct an acquittal in this case.

The Court: Motion denied.

Mr. Darrow: Exception. (Fols. 796-797.)

The defendant and counsel on both sides addressed the jury. (Fols. 797-1124.)

The third count of the indictment was withdrawn. (Fol. 1125.)

The Court charged the jury. (Fols. 1126- .)

The jury returned a verdict finding the defendant guilty of Criminal Anarchy. (Fol. 1247.)

Mr. Recht: The defendant moves to set aside the verdict and for a new trial on the grounds that serious and prejudicial errors of law have been committed through the trial, that the indictment fails to set out a crime; that the section under which the defendant has been indicted is unconstitutional and void and on all the constitutional grounds set out in the Code of Criminal Procedure.

Defendant also moves an arrest of judgment on all the grounds previously stated and also on the ground that this court has not the jurisdiction of the offense for which the defendant has been indicted, on the ground that the section under which the indictment is framed is unconstitutional and void, as it attempts to legislate on a subject which is solely and exclusively within the jurisdiction of Congress and not the State Legislature, and on all the grounds set out in the Code of Criminal Procedure.

The Court: Both motions are denied.

Mr. Recht: Exception. (Fols. 1283-1285.)

The Court: The Legislature of this State has imposed as a minimum penalty for the offence an imprisonment of five years and it is the sentence of the court that this defendant for the felony which



he has been convicted, be imprisoned in the State Prison at hard labor for the term, the minimum of which shall not be less than five years and the maximum of which shall not be more than ten years. (Fol. 1308.)

[Endorsement omitted.]

To the Honorable the Justices of the Supreme Court of the United States:

The return of the Justices of the Supreme Court of the State of New York, in the First Judicial District, County of New York, to the Writ of Error issued out of the Supreme Court of the United States on the seventh day of December, in the year one thousand nine hundred and twenty-two, as follows:

1. The original Writ of Error.
2. The original Petition for Writ of Error.
3. The original Assignment of Errors.
4. The original Bond on Writ of Error.
5. The Citation.
6. Copy Order of Supersedeas.
7. The Præcipe, with a condensed statement of the entire evidence and proceedings on the trial of Benjamin Gitlow, thereto annexed.
8. Copy of the printed papers on application for writ of error, including:
  - a. Notice of Application.
  - b. Supplemental Petition.
  - c. Indictment—Counts 1 and 2.
  - d. Order of Affirmance by Appellate Division.
  - e. Opinion of Appellate Division.
  - f. Judgment of Affirmance and Remittitur in the Court of Appeals.
  - g. Opinions in the Court of Appeals.
  - h. Order of the Supreme Court on the Remittitur.
  - i. Order of the Court of Appeals amending the Remittitur.
  - j. Petition for Writ of Error.
  - k. Order of Mr. Justice Brandeis, referring application to full Court.
  - l. Assignment of Errors.
9. The charge of the Trial Court and the defendant's exceptions thereto, and requests to charge.

And we certify, under seal, to the Honorable the Justices of the Supreme Court of the United States, the annexed record and proceedings had in the criminal prosecution by The People of the State of New York against Benjamin Gitlow.

Dated, at New York City, December 27th, 1922. By the Court. James A. Donegan, Clerk of the County of New York, and of the Supreme Court in the County of New York. [Seal of the Supreme Court of the State and County of New York.]

This return correct. Edward R. Carroll, Special Deputy Clerk of Court.

[Endorsement omitted.]

[Endorsed:] Supreme Court of the United States, October Term, 1922. Benjamin Gitlow, plaintiff-in-error, vs. People of the State of New York, defendant-in-error. Return to writ of error.

Endorsed on cover: File No. 29,320. New York Supreme Court. Term No. 770. Benjamin Gitlow, plaintiff in error, vs. The People of the State of New York. Filed December 29th, 1922. File No. 29,320.

(8469)



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To be argued by

WALTER H. POLLAK and  
WALTER NELLES.

## Supreme Court of the United States

OCTOBER TERM, 1922.

BENJAMIN GITLOW,  
Plaintiff-in-Error,

against

PEOPLE OF THE STATE OF NEW  
YORK,  
Defendant-in-Error.

No. 770.

### BRIEF FOR PLAINTIFF-IN-ERROR.

#### Statement of Facts.

This is a writ of error to review a judgment of the Court of Appeals of the State of New York affirming the conviction of Benjamin Gitlow for a statutory offense designated as criminal anarchy. The offense was held to have been committed by the publication on July 5, 1919, of a particular printed statement of doctrine without evidence of any concrete result flowing therefrom, and without evidence of the proximate likelihood of any such concrete result. The case brings to this Court

for the first time the question of the constitutionality of making advocacy *per se*, and without regard to circumstances, a crime. The federal point raised by exceptions in the record is that the statute and the authority exercised under it by the State of New York, deprived Gitlow of liberty without due process of law.

The provisions of the New York Penal Law (Secs. 160, 161) whose constitutionality and application are called in question are as follows:

"160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

161. Advocacy of criminal anarchy. Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; \* \* \*

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

This statute was enacted in 1902.

The first count of the indictment charged the defendant with *advocating* the doctrine prohibited; the second with publishing a paper *containing* the doctrine.

The extent of the statutory prohibition, for the purposes of this case, is measured by the facts to which the statute was applied.

The printed statement of doctrine, the publication of which formed the basis of the defendant's conviction, was the so-called Manifesto of the Left Wing of the Socialist Party. It is set forth in full in the printed record (pp. 14-48). The doctrine of the Manifesto is candid advocacy of class government in the interests of the working class (dictatorship of the proletariat); it conceives such a result as the natural, and desirable, outcome of an inevitable process of evolution. The Manifesto does not advocate the fomentation of industrial disturbances; these are deemed to occur spontaneously from causes said to be inherent in the economic system. It is predicted that they will result in revolutionary mass strikes (Record, pp. 33, 39).

The two prevailing opinions in the Court of Appeals, *People v. Gitlow*, 234 N. Y. 132, characterized the Manifesto in the following language:

From the opinion of Crane, J. (Record, p. 109):

"It will be seen from the above excerpts that this defendant through the manifesto of the Left Wing advocated the destruction of the state and the establishment of the dictatorship of the proletariat. The way in which this is to be accomplished is by the use of the mass strike."



Judge Crane went on to define "mass strike" as

**"the striking or the ceasing to work by concerted action of, and among, all working classes."**

From the opinion of Hiscock, Ch. J. (Record, p. 119) :

**"We think on the other hand that the jury were entirely justified in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes."**

Our contention is that the statute, prohibiting advocacy as such, without a showing of circumstances in which it is properly punishable, is unconstitutional. We do not therefore discuss the construction of the Manifesto. It may be noted, however, that the holding of the New York courts that the Manifesto contains not only the doctrine of substantive governmental change but also of unlawful means for accomplishing it, is accompanied by a recognition that the Manifesto contains no advocacy in specific terms of force and violence. The opinion adds that there need be no such advocacy (Record, p. 120). The holding is thus by its own terms a construction—by its own terms an inference from predictions of the Manifesto as to the probable development of forces and tendencies conceived as operating of their own accord. The Manifesto contains no plan for creating "mass strikes" or for any specific action. Its professed purpose is to win converts to its theory. Whether the proponents of such a theory of government could ever, with the most unlimited freedom of advocacy, win enough

converts to develop a possibility of carrying it into effect, and what particular program of specific acts, lawful or unlawful, they and their converts might adopt if and when they did, are matters of remote speculation. For the reasons stated, these matters are not relevant to this appeal.

The crucial fact for the purposes of this appeal is that the statute penalizes doctrine as doctrine without regard to consequences or to the proximate likelihood of consequences. The New York courts so construed it, holding that the admitted fact of the defendant's responsibility for the publication of the Manifesto was sufficient to sustain his conviction, without more. And the New York courts *had* so to construe it, for the record is wholly barren of evidence tending to show that any consequences of any sort flowed from the publication, or tending to show that the circumstances surrounding the publication were such as to make it likely that any consequences would flow therefrom. The agreed summary of the entire evidence will be found at pages 170-175 of the record.

The evidence and the concessions of fact made upon the defendant's behalf at the trial showed that the National Council of the so-called Left Wing of the Socialist Party had been directed to prepare a Manifesto by a conference held in New York City in June, 1919, and attended by some ninety persons from fourteen states; that the defendant was a member of this National Council; that 16,000 copies of a publication containing the Manifesto set out in the indictment had been ordered by the defendant, and were printed and delivered to him at the office of the Left Wing in New York City; that copies were wrapped up and mailed out from that office and that other copies were sold there. The indictment did not charge

and the proof did not show to what persons or to how many the Manifesto was distributed. The charge and the proof were merely that it was distributed "among divers people to the Grand Jury aforesaid unknown."

At the close of the evidence the defendant's counsel requested the Court to charge the jury, *inter alia*, as follows:

"8. Unless you find that the defendant intentionally put into writing language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the first count of the indictment.

9. Unless you find that the defendant intentionally published or issued, or circulated with knowledge of the nature of the publication, language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the second count of the indictment" (Record, p. 164).

The Trial Justice, however, declined so to charge, saying:

"I decline to charge that as requested, because of the uncertainty and indefiniteness of the language. 'Put into writing.' He may be equally responsible if he never touched a pencil or pen to paper. *I also refuse to charge it because it says 'language calculated to incite certain persons.'* It makes no difference whether the language was calculated to incite, if the language did

*advise, advocate and teach the doctrine.* If a man tries to do it and his powers of expression are not such as will incite the person to whom he addresses his remarks, that is not his fault. He commits a crime when he advises it" (Record, p. 156).

The Court also declined to charge two other requests (the second and third) which, like the two already quoted, were based upon the doctrine of this Court in the Espionage Act and other cases that expression with relation to government is not in itself punishable—that although utterance or publication in circumstances involving a likelihood of substantive evil may be punished, an exercise of the right of free expression is not in itself a proper subject of punishment (Record, pp. 156, 164). Further, the Court, disregarding not only the principle that there must be likelihood of substantive evil but also the association of "unlawful means" in the statute with "force and violence," ruled that any advocacy not looking toward legislation or constitutional amendment would be advocacy of unlawful means (Record, p. 153). Although he later charged a request inconsistent with this ruling, he stated that he did so "with serious doubts" (Record, p. 156, cf. p. 208).

From the foregoing it is apparent that the Trial Court construed and applied the statute as penalizing doctrine *qua* doctrine, without regard either for the circumstances of its promulgation or for the likelihood of its bringing about an unlawful consequence. Upon this application of the statute the defendant was convicted and his conviction affirmed by both the Appellate Division and the Court of Appeals. Mr. Justice Laughlin, whose

opinion for the unanimous Appellate Division is the fullest discussion in any of the courts below, after citing the decisions of this Court in the cases involving the Espionage Act, said:

"I am of opinion that the common law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here" (Record, p. 77).

*People v. Gitlow*, 195 App. Div. 790.

There was no repudiation of this position in either of the majority opinions in the Court of Appeals.

In the Court of Appeals Judges Pound and Cardozo dissented upon the ground that the statute as passed in 1902 had reference to entirely different advocacies and conditions.

The constitutional question whether advocacy of doctrine as such may be made a subject of criminal prosecution is raised by exceptions to rulings assigned as error and was considered and passed upon adversely by the New York Court of Appeals. When the application for writ of error was presented to Mr. Justice Brandeis, it was referred to the full bench by reason of doubts arising from the manner in which the federal question appeared to have been raised by the defendant's trial counsel. The Court of Appeals then amended its remittitur to show that the federal question had in fact been considered and passed upon (Record, pp. 135-136), and upon the record as thus amended the full bench of this Court granted a writ of error (Record, pp. 165-166).

### **Specification of Errors.**

1. The Trial Court erred in overruling the objection of the defendant's counsel to the taking of any evidence under the indictment, and in overruling his motions at the close of the evidence to dismiss the indictment and direct an acquittal, upon the grounds that the statute under which the indictment was framed contravenes the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall deprive any person of life, liberty or property without due process of law, and that the indictment did not charge and the evidence did not show an offense.

2. The Trial Court erred in refusing the defendant's second, third, eighth and ninth requests to charge (quoted or summarized on pages 6 and 7).

*Assignment of Errors*, Record, pp. 139-143  
(cf. Record, pp. 171, 175, 156).

### **Outline of Argument.**

We shall develop our contentions in the following order:

I. The "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press.

II. The New York statute unduly restrains liberty of expression. That liberty is not absolute. It may be restrained, however, only in circum-

stances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely. The New York statute takes no account of circumstances, and is, therefore, under the settled principles of the subject, unconstitutional.

III. The New York statute rests upon principles of the old common law, which the modern law of England has repudiated in favor of principles in harmony with those of this Court.

IV. The doctrines of the older English common law which the New York statute attempts to revive, are doctrines which never maintained themselves in America. They are inconsistent with the theory of rights and liberties upon which American government rests, and to which the Fourteenth Amendment gave the protection of the Federal Constitution.

V. The New York statute rests upon the same principle as the Federal Sedition Law of 1798—a principle which this Court and every department of the government subsequently condemned.

VI. The New York statute is invalid under the general principles of the law of due process.

**POINT I.**

**The "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press.**

Liberty of expression is a right which the due process clause protects against state action. This is established (a) by the authoritative determinations of the meaning of "liberty" as used in the Fourteenth Amendment; (b) by the assumptions of this Court in dealing with the precise question; and (c) by its explicit declaration with respect to the related right of free assemblage.

(a) In *United States v. Cruikshank*, 92 U. S. 542, 554, this Court said that the Fourteenth Amendment

"furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

"The fundamental rights which belong to every citizen as a member of society" must include the right of expression—particularly the right of expression upon the problems of society and citizenship.

In *Allgeyer v. Louisiana*, 165 U. S. 578, Mr. Justice Peckham thus defined liberty, at page 589:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen



to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The "liberty" which may not be invaded without due process of law includes the "inalienable rights" formulated under the phrase "pursuit of happiness" (and no less clearly under the word "liberty" also) in the Declaration of Independence. And this the Court noted in

*Butchers' Union Company v. Crescent City Company*, 111 U. S. 746, 762; quoted and approved in *Allgeyer v. Louisiana*, *supra*.

By these definitions "the right to follow any of the common occupations of life" may not be arbitrarily infringed. The liberty of contract itself is protected not merely as a right of property but as "included in the right of personal liberty."

*Coppage v. Kansas*, 236 U. S. 1, 14.

To the same effect as the declarations of this Court are many definitions of liberty by State Courts of last resort.

"These terms, 'life,' 'liberty,' and 'property,' are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the

right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil, and political; in short, all that *makes life worth living*; and of none of these liberties can anyone be deprived, except by due process of law \* \* \*.” (Italics the Court’s.)

*State v. Julow*, 129 Mo. 163, 172.\*

“The word ‘liberty,’ as thus employed in the Constitutions and understood in the United States, is a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights.”

*Sol Block and Griff v. Schwartz*, 27 Utah 387, 396.

To the same effect are the definitions by the text writers. Judge Cooley, writing of the Fourteenth

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\* As a result of the inclusion of free speech clauses in all modern State Constitutions, the State Courts have not found it necessary to decide that the right of expression is protected by the due process principle. The point was involved in the debates of the New York State Constitutional Convention of 1821 relating to the adoption of a bill of rights. The State Constitution of 1777, at that time in effect, contained none of the customary bill of rights provisions except a *due process* clause and a provision that no power should be exercised over the people “except such as shall be derived from and granted by them.” The opinion was frequently expressed, and never challenged, that though an explicit bill of rights might be desirable, it was not necessary; as the people had never granted a power to abridge their inherent rights of free press, free assemblage, and the like, those rights were safe without explicit declaration (*Debates, New York Constitutional Convention of 1821*, Albany, 1821, speeches of Chief Justice Spencer, Martin Van Buren, General Tallmadge, and others, pp. 163, 168, 171, 172).

Amendment in the fifth edition of *Story's Commentaries* (Vol. 2, p. 697), says:

"It should be observed of the terms 'life,' 'liberty,' and 'property,' that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law. \* \* \* The word 'liberty' here employed implies the opposite of all those things which, besides the deprivation of life and property, were forbidden by the Great Charter. In the charter as confirmed by Henry III, no freeman was to be seized, or imprisoned, or deprived of his liberties or free customs, or outlawed or banished, or any ways destroyed, except by the law of the land. \* \* \* The guarantee is the negation of arbitrary power in every form which results in a deprivation of right. \* \* \* *It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the freedom of speech, the freedom of religious worship, the right of self-defence against unlawful violence, the right freely to buy and sell as others may, or the right in the public schools, found no protection here.*" (Italics ours.)

To the same effect is the discussion by Mr. Freund, which is so full that we do not quote it here, although extracts will appear in their appropriate connection below. He agrees with Judge Cooley that the Fourteenth Amendment protects all the fundamental rights of the individual, and adds that certain of these fundamental rights—freedom of religion, of speech and press, and of assembly—are singled out as withdrawn from the exercise of the police power in the sense that their exercise cannot, in itself, be regarded as of public

danger (Sec. 445, p. 475). Writing in 1904, he discussed the New York Criminal Anarchy Law and concluded that it was unconstitutional insofar as it penalized the mere exercise of the right of free expression.

*Freund, The Police Power*, Sec. 478, p. 513.

(b) This Court, without explicitly deciding the point, has in three cases rendered decisions upon the assumption that the liberty of speech and press is included in the liberty protected by the Fourteenth Amendment.

In *Patterson v. Colorado*, 205 U. S. 454, the Court left undecided "the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First," but went on to decide the real issue, whether the punishment for a verbal contempt of court there involved was not a deprivation of liberty without due process of law. Mr. Justice Harlan, dissenting on grounds not here material, said:

" \* \* \* the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law."

In *Fox v. Washington*, 236 U. S. 273 (more fully discussed in Point II), jurisdiction was claimed and taken upon the ground that the State statute there in question abridged the liberty of the press without due process of law contrary to the Four-

teenth Amendment. The question was of punishment for language used in such circumstances as to create imminent danger of overt criminal acts. This Court, suggesting no doubt as to its jurisdiction, passed upon the main point in a manner clearly implying that, had the State statute been construed by the Court below as applicable to facts analogous to those in the case at bar, the statute would have been held unconstitutional.

In *Gilbert v. Minnesota*, 254 U. S. 325 (also more fully discussed in Point II), the Court, at page 332, assumed for the purposes of the case the correctness of the claim that a question of deprivation of liberty of speech without due process of law was before it, resting its decision upon the ground that the State had power to punish the language used in the circumstances shown. Mr. Justice Brandeis, dissenting on other grounds, used (p. 343) language similar to that of Mr. Justice Harlan in *Patterson v. Colorado*, *supra*.

In our application for writ of error in this case we pointed out, and we assume from the granting of the writ that this Court agreed, that Mr. Justice Pitney's expressions in *Prudential Insurance Company v. Cheek* ( U. S. , Advance Opinions, June 5, 1922) did not apply to the instant question. That case involved the constitutionality of a statute requiring a corporation, on request of an ex-employee, to issue a "service letter" setting forth the nature and duration of his employment and the cause of its termination. The employer claimed a "liberty of silence." Mr. Justice Pitney declared against this contention. A primary ground of decision was that the statute applied only to corporations, whose right to do business in a State may

be made subject to conditions reasonably deemed expedient.

(c) The right of assembly is in its purpose and policy like the right of free speech. The rights are different aspects merely of a single general right of free expression (cf. *Neeley v. Farr*, 61 Colo. 485, especially the quotation from Senator Thomas' brief at p. 510; *State v. Junkin*, 85 Neb. 1, 3-4). The First Amendment to the Federal Constitution joins the two rights in a single sentence.

In *United States v. Cruikshank*, 92 U. S. 542 (quoted and approved in *Twining v. New Jersey*, 211 U. S. 78, 96-97), this Court declared that the Fourteenth Amendment protects the right of assembly from State interference, saying at page 551:

"The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. *The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.*"

And at page 554:

"The Fourteenth Amendment \* \* \* furnishes an additional guaranty against any

encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

The rights of free speech and press must have equal standing and protection.

In deciding whether a right is protected under the due process clause, the question, as was said in *Twining v. New Jersey*, 211 U. S. 78, 106, is this:

"Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?"

With respect to freedom of opinion and expression on matters of public concern, the question can be answered in only one way.

## POINT II.

**The New York statute unduly restrains liberty of expression. That liberty is not absolute. It may be restrained, however, only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely. The New York statute takes no account of circumstances, and is, therefore, under the settled principles of the subject, unconstitutional.**

Liberty of expression has two aspects—private and public. Man is a free agent to use his tongue and pen, as he may use his brain and body generally, for his own benefit or harm in the conduct of his private affairs. If he hurts another, or comes dangerously near it, he is answerable. He is answerable for a personal libel, both civilly and criminally, as he is answerable for a blow. He may not ride his bicycle on a city sidewalk, even under particular circumstances where his so doing entails no actual danger. For against his merely private interest lies the general interest in the safety of the streets, which warrants punishment for even a harmless particular exercise of his private liberty of locomotion. Similarly, he may not utter obscenity or sell stock by a false prospectus; his films or his mail matter may even be censored in advance to prevent his doing so.

The citizen's liberty to take part in public affairs stands on another and broader footing. His exer-



cise of his right is free not only in his own interest but in the interest of the whole community. It is not for his benefit alone that he is permitted to express his views of law, government and politics, and propose his remedies. His views may be silly, his remedies preposterous. Their mere utterance creates some danger that unthinking members of the community may undertake to act upon them. But he is not to be punished either for their foolishness or for the danger incident to mere utterance—for the danger inherent in the doctrines themselves, as distinct from a danger arising from their utterance in particular circumstances. The citizen has a right to express, for the State may have an interest in hearing, any doctrine. Free government is premised upon the proposition that no human agency other than the ultimate good sense of the whole community can be trusted with power to gauge the dangerous tendency of mere expression of political doctrine. The utterance even of dangerous folly may be a valuable index of the need of wisdom. Folly may suggest wisdom. The liberty of opinion and expression which is essential to free government and which the Constitution protects, is thus an immunity from prosecution because of the intrinsic quality of the ideas expressed.

The liberty even of public expression is not unlimited license; and this Court has both recognized the principle and stated the limits. When there occurs a substantive evil which the Legislature has a right to prevent, the speaker of language which caused it may be punished. Again, when a substantive evil is attempted, it is no defense for a person involved in the attempt that his only act was verbal, and that his words expressed an

idea or proposal relating to government. Finally, a person who utters words in circumstances creating a clear and present danger of such substantive evil, or directly tending to bring it about, may be punished.

*Fox v. Washington*, 236 U. S. 273.

*Schenck v. United States*, 249 U. S. 47.

*Debs v. United States*, 249 U. S. 211.

*Frohwerk v. United States*, 249 U. S. 204.

*Abrams v. United States*, 250 U. S. 616.

*Schaefer v. United States*, 251 U. S. 466.

*Pierce v. United States*, 252 U. S. 239.

*Gilbert v. Minnesota*, 254 U. S. 325.

We shall show in the course of the following argument (a) that this, in substance, is the limit set by this Court to the power of the State to punish the utterance of political doctrine: there must be a causal connection between the utterance and a substantive evil, consummated, attempted, or likely. We shall then show (b) that the New York Criminal Anarchy Law, as construed in this case, is inconsistent with this limitation, and far oversteps it, and (c) that the New York courts have admitted this inconsistency and disregarded it.

(a) *The doctrine of this Court.*

In *Schenck v. United States* this Court said—and its reference to “every case” shows that it was declaring a fundamental general principle:

“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent” (249 U. S. at p. 52).

The *Schenck* case was the first case in this Court under the Espionage Act and was designed to settle the law on the subject. That decision was followed a week later by *Debs v. United States*, in which this Court, affirming the conviction of the defendant, pointed out that

“ \* \* \* the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service” (249 U. S. at p. 216).

The charge to the jury approved in the *Debs* case is in the form of words frequently used by the Courts to express the limit of the power to punish utterances of doctrine. We believe the implications of the phrase here employed—“natural tendency and reasonably probable effect”—to be identical with those of the statement of the law in the *Schenck* case. Both express the purpose of this Court to apply to this question the legal principle of causation—the requirement that there be a causal connection between the act sought to be punished and a substantive evil—that test “of proximity and degree” illustrated in the criminal law of attempts, and elsewhere (*Commonwealth v. Peaslee*, 177 Mass. 267, 272; *Swift & Co. v. United States*, 196 U. S. 375, 396).

The boundary of the field protected in the name of liberty of speech in the *Schenck* and *Debs* cases had previously been marked out by this Court. In *For v. Washington*, 236 U. S. 274, the Court had before it a statute purporting, like the New York

Criminal Anarchy Law, to control utterances of offensive doctrine. The Act made it a crime to publish any writing

“ \* \* \* advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, \* \* \*.”

It is to be noted that this statute punishes writings advocating, and writings tending to advocate, certain doctrines. It will assist in defining the implications of the rule of causation laid down in the *Schenck* and *Debs* cases to observe the narrow grounds on which alone this Court admitted the Washington statute to be constitutional.

Fox had been convicted under the Washington law for the publication of an article entitled “The Nude and the Prudes.” This article was addressed to the members of a colony called “Home,” which had been erected, as the article declared,

“ \* \* \* to escape the polluted atmosphere of priest-ridden, conventional society \* \* \*.”

The article explained that in Home

“ \* \* \* one of the liberties enjoyed \* \* \* was the privilege to bathe in evening dress, or with merely the clothes nature gave them, just as they chose.”

Some neighbors had procured the conviction of members of the colony for violating the laws against indecent exposure; and Fox's article advocated a boycott of these neighbors

“until these invaders will come to see the brutal mistake of their action \* \* \*.”

Thus, as this Court commented,

"\* \* \* by indirection, but unmistakably the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; \* \* \*."

The State Court had sustained the constitutionality of the Act upon broad grounds (*State v. Fox*, 71 Wash. 185). This Court made clear that it did not adopt these broad grounds. The circumstances surrounding the publication appeared, and were as follows: There were immediately present a group of persons to whom the article was addressed, who were engaged in acts violative of a criminal statute, and whom the article encouraged in a persistent continuation of that course. In sustaining the Act, this Court related the utterance to these circumstances in such a manner as to show that it was only in their light that the publication could constitutionally be punished:

"We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law."

Again:

"It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general" (*Fox v. Washington*, 236 U. S. at p. 277).

This Court was careful to add:

"If the statute should be construed as going no farther than it is necessary to go in

order to bring the defendant within it, there is no trouble with it for want of definiteness."

And it showed in the same opinion how far—and "no farther"—the State might go:

"In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act."

In these three cases this Court established the principle that guilt may not rest upon the fact of publication alone—upon danger inherent in the quality of the words used. It is in the light of surrounding circumstances that the danger of publication is to be tested.

In the Espionage Act cases, the extrinsic circumstance of fundamental importance was the war.

"When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

*Schenck v. U. S.*, 249 U. S. 47, 52.

The influence of this circumstance was thus expressed by Mr. Justice Sutherland: "Everything" that the citizen

"has, or is, or hopes to be—property, liberty, life—may be required. In time of peace, an attempt to interfere with the least of these would be, and ought to be, resisted to the utmost. In time of war, when the Nation is in deadly peril, every freeman, who prizes

the boon of *enduring* liberty, will lay them all, freely and ungrudgingly, upon the sacrificial altar of his country.

And so, freedom of speech may be curtailed or denied, in order that the morale of the population and the fighting spirit of the army may not be broken by the preachers of sedition; freedom of the press interfered with, in order that our military plans and movements may not be made known to the enemy; \* \* \* property of alien enemies lawfully in the country and normally under the protection of the Constitution, seized without judicial process and converted to the public use without 'due process of law'; \* \* \* and a multitude of other powers, the exercise of which in time of peace would be intolerable and inadmissible, may be employed, by or under the direction of Congress, to meet the necessities and emergencies of war."

*Sutherland, Constitutional Power and World Affairs* (1919), 98, 99.

War is "the emergency that makes it immediately dangerous to leave the correction of evil counsels to time" (Holmes, J., in *Abrams v. United States*, 250 U. S. at pp. 630-631). War is itself the greatest of circumstances and one that may sharpen the significance of specific incidents surrounding publication. Even in war circumstances of danger, actual, attempted or likely, must appear, and the Espionage decisions—once the principles were settled—involved primarily an analysis of the circumstances of publication.

In the first of the Espionage Act cases, Schenck and his co-defendants had mailed to men who had passed exemption boards circulars which not only

declared conscription to be unconstitutional, but urged the recipients "in impassioned language" to assert their rights. How vital this Court deemed the circumstances appears from its opinion:

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights" (*Schenck v. United States*, 249 U. S. at p. 52).

In the *Frohwerk* case (249 U. S. 204) analysis of circumstances was impossible because there was no bill of exceptions. The Court recognized (at p. 208) that what was said might have been said even in time of war "in circumstances that would not make it a crime"; but, since no statement of the evidence had been included in the record, found it impossible to say that the circulation was not "in quarters where a little breath would be enough to kindle a flame." In the *Debs* case it was held that if the defendant's abstract opposition to war was intended to obstruct recruiting, and "if, in all the circumstances, that would be its probable effect," it was not constitutionally protected (249 U. S. at p. 215). In the *Sugarman* case (249 U. S. 182) the circumstances were similar to those in the *Schenck* case—an anti-draft speech at a meeting attended by many registrants under the Selective Service Act.

The true quality of the analysis of circumstances is also illustrated in the later cases under the Espionage Act. In each case the question was "of proximity and degree" (*Schenck v. U. S.*, *supra*), and it was answered by that process of inclusion and exclusion with which this Court has resolved many problems of constitutional power.



*Abrams v. United States*, 250 U. S. 616, is a step in this process of definition; the members of the Court differed, the majority voting for inclusion, the minority for exclusion. The majority expressly adopts the statement of the law in the *Schenck* case:

"This contention" [that the Espionage Act violates the First Amendment] "is sufficiently discussed and is definitely negated in *Schenck v. United States* and *Baer v. United States*, 249 U. S. 47; and in *Frohwerk v. United States*, 249 U. S. 204" (250 U. S. at p. 619).

The emphasis upon the circumstances of the publication is quite as marked in the *Abrams* case as in the *Schenck* case. *Abrams'* pamphlets were not merely issued in war time, but were

"circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, \* \* \*" (250 U. S. at p. 622).

The *Schaefer* case (251 U. S. 466) is like the *Abrams* case. The majority and minority of the Court were in express accord upon the law; both the majority (251 U. S. 477) and Mr. Justice Brandeis in his dissent (*ibid*, p. 482) cite the *Schenck* case as settling the law of the subject. The disagreement between majority and minority in this case, as in the *Abrams* case, was on the question whether the circumstances were such as to warrant submission to the jury of the issue of danger of substantive evil. Weight was given to evidence

that the defendants had wilfully garbled news despatches before publication (pp. 473, 481).

In the *Pierce* case (252 U. S. 239) also there was no disagreement as to the law as settled in the *Schenck* and *Debs* cases. The defendants had distributed anti-war circulars on door-steps. The majority (through Mr. Justice Pitney), citing these cases, reiterated the rule that

"Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide *in view of all the circumstances of the time and considering the place and manner of distribution*" (252 U. S. at p. 250).

In the latest of the war time cases (*Gilbert v. Minnesota*, 254 U. S. 325), a State statute was involved. Gilbert was convicted under the Minnesota law (Laws of 1917, Chap. 463), making it unlawful

"for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

Gilbert had made a speech before a crowd of several hundred persons. The Court notes and states the circumstances in which the speech was made. It

"was resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence" (254 U. S. at p. 331).

The State Court had dismissed the constitutional objection with a sentence (*State v. Gilbert*, 141 Minn. 263), referring to *State v. Holm*, 139 Minn. 267, and following cases, as conclusive of the constitutionality of the statute.

A reference to the *Holm* case shows that the grounds on which the State Court upheld the statute were as sweeping as those of the Supreme Court of Washington in *State v. Fox*, *supra*. But in the *Gilbert* case, as in the *Fox* case, there is a sharp contrast between the broad acceptance of the statute by the State Court and the manner in which this Court related the expression to the circumstances of utterance:

"On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such a result or a danger of it is a proper exercise of the power of the State" (254 U. S. at pp. 331-332).

The Espionage Act cases and the others here reviewed establish this as the doctrine of this Court: that in order constitutionally to extend the police power or a Federal power limited on like principles, to the suppression of the utterance of political opinion, something more must be shown than knowing and intentional publication or utterance. The expression must be attended by circumstances presenting a "clear and present danger of substantive evil," or making such a result "reasonably probable." Whichever way the rule be stated, it is a rule requiring that there be a causal connection between the utterance condemned and a substantive evil.

This rule necessarily implies that advocacy of doctrine may not in itself be a subject of punishment. It may be punished only in circumstances which give it the quality of incitement to crime.

Mr. Wharton, approaching the subject from the point of view of the law of crimes, states in other terms the distinction which this Court applied. The use of language,\* he says, may be a subject of indictment (1) where it is an inducement to commit crime—that is, where circumstances give it the quality of incitement; or (2) where it actually amounts to or is a stage toward an independent consummated offense. Language itself, apart from criminal effect or utterance in dangerous circumstances, cannot constitutionally be punished; for otherwise,

“the propagandists, even in conversation, of agrarian or communistic theories, are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press will be greatly infringed.”

1 *Wharton Crim. Law*, 11 Ed., 278.

Mr. Wharton's illustrations suggest three classes of situations in which the use of language may be punished: (1) Utterance may be punished when it of itself inflicts an injury, as in the case of personal libels. (2) Utterance may be punished when it in fact leads to an injury; as when A counsels B to commit an assault, and the assault is actually committed. (3) Utterance may be punished when it has the quality of incitement.

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\* Mr. Wharton uses the phrase “solicitations to commit crime,” but does not limit “solicitations” to its technical meaning in criminal law.

It may have this quality in a considerable variety of circumstances; it cannot have it altogether independently of circumstances. Thus, to approve assault in a soliloquy is not a crime. But express inducement of another to commit an assault may be punished if it was seriously intended or understood and addressed to a person who might be excited to action. More circumstances are necessary to support a conclusion that indirect suggestions or abstract observations amount to an incitement. Language, as Hamilton pointed out (see quotation *infra*, p. 93), may be harmless in one set of circumstances, incendiary in another. Circumstances may show, but only circumstances can show, the true meaning of ironic praise, which may, in a particular setting, constitute a libel or a criminal incitement. Personal abuse of an individual may be mere rhetoric; but its insinuation in the ear of his enemy might amount to incitement to assault. If circumstances were left out of account and punishment were for mere utterance, it would amount to punishment for speculative possibilities. Such punishment would be unconstitutional; the danger of criminal result must be reasonably definite and certain.\*

It is because so little beyond the mere use of the language—its bare communication to someone likely to act—is required to show the criminality of an utterance of *direct incitement* to violence (such as advocacy of assassination or assault) that a statute which expressly directs its prohibition against such utterances may be valid. But crim-

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\* Compare, for example, *Swift & Co. v. United States*, 196 U. S. 375, 396; *Waters Pierce Oil Co. v. United States*, 212 U. S. 86, 109; *Collins v. Kentucky*, 234 U. S. 634, 637.

inality even here lies in relation to *consequences* rather than in the mere fact of utterance; and a valid statute should rather prohibit a result or dangerous approach to it than utterance itself. Thus the Espionage Act prohibited results—such as obstruction of the recruiting service. The ban of the statute was not upon the use of language as such; but it was no defense, where an act did in fact naturally obstruct the recruiting service, that that act was an utterance which in itself apart from circumstances would be immune from prosecution. (See *Schenck v. United States*, *supra*, at p. 52.)

This principle of immunity of language *per se*—especially language relating to law and government—was also stated, even before the decisions of this Court under the due process clause (*Fox v. Washington* and *Gilbert v. Minnesota*, *supra*) and the First Amendment (Espionage Act cases, *supra*), by Mr. Freund, approaching the subject not from the side of the law of crimes but from that of the law of due process and the police power. The New York Criminal Anarchy Law was passed in 1902. Mr. Freund wrote in 1904. Considering the New York statute from the point of view of this principle, he concluded that the statute (except in its relation to advocacy of assassination, with which Gitlow is not charged, and which might be held without special circumstances to have the quality of incitement) was unconstitutional.

(b) *The New York Criminal Anarchy Law in the light of the doctrine of this Court.*

The New York statute, as Mr. Freund perceived long before it came before the courts, disregards on its face the constitutional principles above set

forth. It does not punish incitement. It punishes the mere utterance—"advocacy"—of certain doctrines, whether or not such utterance was reasonably calculated to persuade persons to the acts condemned, or to any unlawful conduct whatever, and whether or not a causal connection between the utterance and a substantive evil can be deduced from surrounding circumstances.

The language of the statute calls for such a construction. The New York Courts so construed it, and *had*, upon this record, so to construe it, for the record is wholly barren of evidence of the circumstances of dissemination (see pp. 5-8, *supra*). And the New York Courts, as we shall see, coupled their holding of its validity with an express repudiation of the principle of causation laid down by this Court in the decisions we have analyzed.

Mr. Freund states the principles as follows:

"A proposition to forbid and punish the teaching or the propagation of the doctrine of anarchism, i. e., the doctrine or belief that all established government is wrongful and pernicious and should be destroyed is inconsistent with the freedom of speech and press, unless carefully confined to cases of solicitation of crime, which will be discussed presently. As the freedom of religion would have no meaning without the liberty of attacking all religion, so the freedom of political discussion is merely a phrase if it must stop short of questioning the fundamental ideas of politics, law and government. Otherwise every government is justified in drawing the line of free discussion at those principles or institutions, which it deems essential to its perpetuation—a view to which the Russian government would subscribe. It is the

essence of political liberty that it may create disaffection or other inconvenience to the existing government, otherwise there would be no merit in tolerating it. This toleration, however, like all toleration, is based not upon generosity, but on sound policy; on the consideration, namely, that ideas are not suppressed by suppressing their free and public discussion, and that such discussion alone can render them harmless and remove the excuse for illegality by giving hope of their realization by lawful means.

Freedom of speech finds, however, its limit in incitement to crime and violence. By the principles of the common law, the procurement of crime is in itself a criminal act, and a conspiracy to commit a crime is criminal though the end is never accomplished or even undertaken. The prohibition of acts punishable at common law is of course within the constitutional power of the state governments. Therefore a statute may validly forbid all speaking and writing the object of which is to incite directly to the commission of violence and crime."

*Freund, The Police Power*, Secs. 475-476, pp. 509-510.

And, applying these principles to the New York statute, he concludes:

"In accordance with the principles above set forth the constitutional guaranty of freedom of speech and press and assembly demands the right to oppose all government and to argue that the overthrow of government cannot be accomplished otherwise than by force; and the statutes referred to, in so far as they deny these rights, should consequently be considered as unconstitutional."

*Freund, The Police Power*, Sec. 478, p. 513.



The distinction drawn by Mr. Freund between valid and invalid legislation is clearly the same which Mr. Wharton deduced from his study of the whole field of crime and which this Court recognized and applied in the decisions we have analyzed. To restate it once more: A statute is constitutional which prohibits incitement to crime; a statute is unconstitutional which prohibits the advocacy of doctrines. The distinction between incitement and advocacy is plain. Incitement speaks in the imperative; advocacy in the conditional. Only circumstances can transform advocacy into incitement. The right to advocate theories of government, sound or unsound, is larger than the merely private liberty of faculty and function; its abridgment cramps not only the thought of the individual, but that of the whole community. As Mr. Freund points out, it is "merely a phrase" if it cannot go to the length of opposing the most fundamental institutions and intimating the opinion that unlawful collective means are necessary for their alteration. Any danger which the mere existence and exercise of such a right may in itself involve, must, under our Constitution, be tolerated. Against such danger, as distinct from the danger inherent in surrounding circumstances, the good sense of the community is a sufficient safeguard.

(c) *Disregard of constitutional principles by the New York Courts.*

The New York Courts in this case perfectly recognized, and disregarded, the inconsistency between the statute which they sustained and these principles; they held advocacy punishable without circumstances giving it the character of incitement.

This is shown both by rulings denied and rulings made.

The Trial Court, squarely holding that the issue was of advocacy only, refused requests to charge (p. 6, *supra*) obviously derived from the principles of the Espionage Act cases and designed to present to the jury an issue of tendency to incite unlawful action. In this the New York appellate courts found no error.

The opinion of the unanimous Appellate Division, after citing the Espionage Act cases and stating their principles, flatly held them inapplicable:

"The courts in construing such statutes have in some instances said that the danger to be apprehended from a doctrine, the advocacy of which is lawfully and constitutionally forbidden, must be present or immediate (*Schenck v. U. S.*, *supra*; *Masses Pub. Co. v. Patten*, 244 Fed. Rep. 535, reversed 246 Fed. Rep. 24; *Colyer et al. v. Skeffington*, 265 Fed. Rep. 17); and in other decisions it is stated that a question of proximity and degree is involved, and that the 'natural tendency and reasonably probable effect' of the words used must be to accomplish the evil which it is the purpose of the statute to guard against (*Debs v. United States*, 249 U. S. 211; *Commonwealth v. Peaslee*, 177 Mass. 267; *Abrams v. United States*, 250 U. S., dissenting opinion by Mr. Justice Holmes at p. 627; *Schaefer v. U. S.*, 251 U. S. 466; *Pierce v. U. S.*, 252 U. S. 239).

"I am of opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here"

(*People v. Gitlow*, 195 App. Div. 790; Record, pp. 76-77).

And again:

"I cannot subscribe to the doctrine that it is not competent for the Legislature to forbid the advocacy of such a doctrine designed and intended to overthrow government in this manner, until it can be shown that there is a present or immediate danger that it will be successful.† \* \* \* If they (laws for the preservation of state and nation) are reasonably adapted to that end and are based on danger reasonably to be apprehended, even though not present or immediate, they may not be annulled by the courts \* \* \*" (*People v. Gitlow*, *supra*, pp. 790-792; Record, p. 77).

The majority of the Court of Appeals affirmed the decision of the Appellate Division and did not reject the reasoning upon which it was based. The statements above quoted show alike the agreement of the New York Courts with Mr. Freund's construction of the statute as an *advocacy* statute pure and simple, and the departure from accepted constitutional principles by which alone the conviction could be sustained. The Appellate Division went so far as to say that the objection to the statute under the due process clause did not raise a question of legislative power to enact such a stat-

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† It was not claimed either in the appellate courts or in the requests to charge which were denied at the trial (p. 6, *supra*) that there must be a danger that government will in fact be overthrown. The requests to charge contemplated submission to the jury of the question whether the publication was "reasonably and ordinarily calculated to incite \* \* \* acts of unlawfulness"—which might, of course, fall far short of endangering government.

ute, but only whether the statute undertook to dispense with some procedural requirement essential to due process of law:

"Manifestly the argument based on lack of due process needs no extended consideration, for he has had and is having due process of law which entitles him to a hearing and determination by a court of competent jurisdiction" (197 App. Div. at p. 733; Record, p. 71).

This is answered by a host of decisions by this Court invalidating State statutes under the due process clause. This Court said in *Davidson v. New Orleans*, 96 U. S. 97, 102:

"When, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition of the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation."

The Court of Appeals intimated no disagreement with the views of the Appellate Division which have been referred to. The majority opinions (234 N. Y. 132, 136; Record, pp. 103, 114) were equally inconsistent with the principles laid down by this Court, passing the constitutional question with hardly more than a reference to *People v. Most*, 171 N. Y. 423.

The reference to the *Most* case is answered by a consideration of its facts. *Most*, an anarchist of

international notoriety, on the day of President McKinley's assassination, published an article urging his readers to "murder the murderers, save humanity, through blood and iron, poison and dynamite." If any man was ever convicted not for advocating a doctrine but for inciting to acts, it was Most. Indeed, the statute under which he was prosecuted and convicted did not relate to advocacy as such; it punished for "any act \* \* \* which seriously disturbs or endangers the public peace" (*N. Y. Penal Law*, Sec. 43).

The distinction between the advocacy of doctrine and the incitement to assassination was noted by this Court in the Espionage decisions themselves and while the Court was developing the principles we have stated (*Frohwerk v. U. S.*, 249 U. S. 204, 206); and Mr. Freund, in the course of developing his argument against the constitutionality of the Criminal Anarchy Law of New York, concedes as obvious the right to punish for incitement to assassination (*Police Power*, Secs. 475, 478).

"The difference lies in the fact that assassination may be accomplished in a moment, without warning, by a single person. \* \* \* The state may suppress incitement to assassination because the danger can be coped with in no less drastic way."

36 *Harvard Law Review* 203, n. 25.

The *Most* case is an authority for the acknowledged right to punish criminal incitement, not for the asserted right to punish a repugnant political advocacy *per se*, irrespective of circumstances which might give it the character of incitement.

The decision in the instant case cannot be reconciled and was not sought to be reconciled by the Courts which rendered it with the principles of the precise subject as they have been developed in this Court. Because the decision below is inconsistent with the rulings here, that decision should be reversed. The importance and novelty of the subject justify, however, the demonstration which follows. That demonstration will be designed to show how completely the rulings of this Court express—and how definitely the rulings of the New York Courts violate—the principles of the right of political expression both as they have finally been developed in England at common law and as they were developed by the history of the American colonies and the American Revolution.

### **POINT III.**

**The New York statute rests upon principles of the old common law, which the modern law of England has repudiated in favor of principles in harmony with those of this Court.**

In the eighteenth century (as we later show more fully) the crime of seditious libel in England had a strong affinity with the New York statutory crime of criminal anarchy. The object of prosecution was to prevent the circulation of sentiments of disaffection. Language was punished for its disloyal content, without inquiry whether it was uttered in circumstances in which it might have the quality of incitement. The process of correction or modification of evil counsels by time upon which

we now, under the conditions of free government, rely, was untried and unproved. Disaffection towards fundamental institutions was presumed, without proof of circumstances, to lead proximately to breach of the peace. The theory of punishment was derived from *Atwood's Case* (1605, 2 Rolle's Abridgement 78), where it was expressly held that the reason why disparagement of the Established Church was *per se* punishable was that it led to breach of the peace. The court might have said, as the New York courts said in this case, that though the defendant did not expressly urge unlawful acts or means for the accomplishment of his desire to change a fundamental institution, he was "chargeable with knowledge" that such an end could not be accomplished without violence (*People v. Gitlow*, 195 App. Div. 783, 795, Record, pp. 66, 84; cf. 234 N. Y. 149, Record, p. 120). The principle of the older common law of seditious libel is identical with that of the New York statute. Under both a danger of unlawful acts is deduced, not from circumstances or from language of direct incitement, but from the nature of the end sought. In purporting to test criminality by the unlawfulness of means advocated rather than by the nature of ends sought, the New York statute is only expressing what the older English common law implied.

The English courts, however, adapting the law of seditious libel to the modern facts of English constitutional freedom, have come to recognize an immunity of political advocacy *per se* like that implicit in the decisions of this Court.

The law of seditious libel as formulated in 1820 (Statute of 60 Geo. III and 1 Geo. IV, Chap. 8, Sec. 1) punishes as seditious any words tending

“to bring into hatred or contempt the person of his Majesty \* \* \* or the government or constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty’s subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means.”

This statute declared only what had always been the theory of the law of seditious libel; it was not designed to temper or mitigate the existing law or practice. It was passed following the Manchester riots of 1819 (2 May, *Constitutional History of England*, Chap. X, pp. 191 *et seq.*). The earlier prosecutions under it proceeded exactly upon the principles of the older common law. The only issue of fact was that of publication. The intent and bad tendency of the libel were presumed upon no evidence outside of the libel itself (*Rex v. Burdett*, 1820, 4 B. & Ald. 95; *Reg v. Collins*, 1839, 9 C. & P. 456; *Reg v. Lovett*, *ib.* 462).

In later cases, however, the rule was extended to permit the jury to take into consideration all the surrounding circumstances—“the state of the country—the state of public opinion” (*Reg. v. Sullivan*, 1868, 11 Cox C. C. 44, at p. 59). And after nineteenth century parliamentary reforms had more fully established in England principles of political liberty similar to those established in America by the Revolution and confirmed by our constitutions, the bad tendency of libels became a matter of definite proof. Sir James Fitzjames Stephen says:



"There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offenses, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal."

2 *Stephen, History of the Criminal Law*, 300.

And in 1909 Lord Coleridge charged the jury in *Rex v. Aldred*\* (74 J. P. 55; 22 Cox C. C. 1) in language whose accord with the principles applied by this Court in the Espionage Act cases is as striking as its contradistinction to the principles of the New York Criminal Anarchy Law. He said that the word "sedition" "implies violence or lawlessness in some form." He stated the test as the tendency towards incitement:

"Whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel. The test is not either the truth of the language or the innocence of the motive with which he published it, but the test is this: Was the language used calculated to promote public disorder or physical force or violence in a matter of State?"

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\*A case involving advocacy of political assassination in India. The defendant was convicted.

He made clear that this test involved consideration not alone of the content of the language but also of the circumstances of its use. He said:

"The test \* \* \* is for you, the jury, to decide, having heard all the circumstances connected with the case. In arriving at a decision of this test you are entitled to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed: that is to say, you are entitled to look at the audience addressed, because language, which would be innocuous, practically speaking, if used to an assemblage of professors or divines, might produce a different result if used before an excited audience of young and uneducated men. You are entitled also to take into account the state of public feeling. Of course there are times when a spark will explode a powder magazine; the effect of language may be very different at one time from what it would be at another. You are entitled also to take into account the place and mode of publication."

He emphasized finally that no advocacy could be *per se* the subject of prosecution. He said that if a man

"thinks that either a despotism, or an oligarchy, or a republic, or even no government at all, is the best way of conducting human affairs, he is at perfect liberty to say so. \* \* \* He may seek to show that rebellions, insurrections, outrages, assassinations and such-like, are the natural, the deplorable, the inevitable outcome of the policy which he is combating."

#### POINT IV.

**The doctrines of the older English common law which the New York statute attempts to revive are doctrines which never maintained themselves in America. They are inconsistent with the theory of rights and liberties upon which American government rests, and to which the Fourteenth Amendment gave the protection of the Federal Constitution.**

We have shown how this Court, under both the First and Fourteenth Amendments, limiting the punishment of advocacy to situations where circumstances give to advocacy the character of incitement, has recognized the constitutional immunity of advocacy *per se*. We have shown also how the law of England has deduced a similar immunity from the necessities of free government. It remains to point out how the conception of such an immunity developed in the American colonies and became imbedded in our institutions, and how decisively the view inconsistent with it has been repudiated.

The inconsistent view rests upon the assumption that freedom of speech and press in American constitutions means only what it meant at common law in England in the eighteenth century—a liberty to publish, subject to an unlimited right of the government to punish for what is published. We carried over, of course, only the parts of the common law consistent with American conditions. Common law doctrines deduced from and depend-

ent upon the very theory of the obligations of people to government from which we revolted were almost by definition inconsistent with American conditions, and were discarded.

The English eighteenth century law of seditious libel was such a doctrine. It is important as showing, not what American law is, but what it is not.

1. *The English common law of the eighteenth century, limiting freedom of the press to freedom from censorship, sanctioned the suppression of ideas of democracy and reform by prosecutions for seditious libel.*

A review of eighteenth century decisions will show that the English courts proceeded on principles like those of the New York Criminal Anarchy Law. Guilt depended solely upon the construction of the language used, irrespective of circumstances. Though punishment was theoretically based upon danger to the peace (*Atwood's Case*, 1605, 2 Rolle's Abridgment 78), the quality of disaffection in language used was sufficient in itself to support the ascription of seditious intent and dangerous tendency. The law in the eighteenth century ascribed substantially the same immutable sanctity to then existing institutions that Lord Jefferies at the trial of Algernon Sidney, shortly before the end of the seventeenth century (1683), had ascribed to monarchy by Divine Right, when he said:

"Pray do not go away with that right of mankind, that it is lawful for me to write what I will in my own closet, unless I publish it; I have been told, Curse not thy king, not in thy thoughts, not in thy bed chamber, the birds of the air will carry it. I took

it to be the duty of mankind, to observe that."

9 *Cobbett's State Trials*, 868.

In *Res v. Tutchin* (1704), 5 St. Tr. 527, 14 Howell's St. Tr. 651, the defendant had attributed "the sad state of the country to the influence of French gold on those who have the conduct of affairs," and complained of "the mismanagement of the navy through the ignorance and incapacity of those who have the management of it." He had also commented upon the severe punishment of Daniel De Foe for his "Shortest Way with Dissenters" as inconsistent with the "ancient birthrights and immunities of Englishmen." Lord Holt charged the jury:

"If persons should not be called to account for ~~possessing~~ the people with an ill opinion of the Government, no Government can subsist: for it is very necessary for all Governments that the people should have a good opinion of it";

finally leaving it to the jury to determine whether the words he had read to them

"did not tend to beget an ill opinion of the administration of the government."

The *Tutchin* case is noteworthy, not for its harshness, but for its comparative liberality. The construction, intent and tendency of the libel were, according to most eighteenth century judges, matters of law; Lord Holt, however, left construction, intent and tendency to the jury. (See also his charge in *Fuller's Case*, 8 *Cobbett's St. Tr.* 78.)

In *Franklin's Case* (1731), 17 Howell's St. Tr. 1243, Lord Raymond established for most of the subsequent seditious libel cases of the eighteenth century that the jury had no function except to find whether the defendant published the matter as charged. Its construction, intent and tendency were for the Court as a matter of law, upon no evidence except the libel itself.

Truth was no defense—"the greater the truth, the greater the libel."

On these theories prosecutions for seditious libel flourished during the eighteenth century. The cases which are best known, and which enlisted American interest in the period between the Stamp Act and the Revolution, are those arising out of the writings of Wilkes and Junius in the period immediately preceding the American Revolution. Wilkes and Junius attacked a parliamentary system which they denounced as rotten with corruption; their attacks were the precursors of the nineteenth century parliamentary reforms. They bred in fact an ill opinion of government and a disposition to insist upon changes. They expressed the theory of the rights of the people as against government which had been formulated by Locke following the Revolution of 1688—the "inalienable rights" theory of the Declaration of Independence.

Wilkes' libel (No. 45 of the North Briton, published in 1763) was an attack on the ministry of Lord Bute. Wilkes wrote:

"In vain will such a minister or the foul dregs of his power, the tools of corruption and despotism, preach up in the speech and spirit of concord. \* \* \* A nation as sen-

sible as the English will see that a spirit of concord, when they are oppressed, means a tame submission to injury and that a spirit of liberty ought then to arise . . . in proportion to the weight of the grievance they feel. Every legal attempt of a contrary tendency to the spirit of concord will be deemed a justifiable resistance."

19 *Howell, State Trials*, 1385-1386.

Wilkes was convicted during his absence from the country and outlawed. The Wilkes libel prosecution—an *ex parte* proceeding in view of Wilkes' absence in France—appears not to have been reported. Lord Mansfield is said to have charged as he did later in the cases arising from the publication of Junius' *Letter to the King* (2 *May, Const. Hist.*, Chap. IX). After Wilkes' outlawry was reversed, he was repeatedly excluded from Parliament, to which he was as often re-elected (19 *Howell, State Trials*, 981, *seq.*, 1075; 15 *Parliamentary History*, 1362).

As the identity of Junius was never learned, he was not prosecuted. The following are the reported prosecutions of printers of his *Letter to the King*:

*Rex v. Almon* (1769), 20 *Howell's State Trials* 802, 821; Burr 2686.

*Rex v. Woodfall* (1770), 20 *ibid.* 895.

*Rex v. Miller* (1770), *ibid.* 870.

In all of these cases Lord Mansfield charged that the jury were to find only the fact of publication and the meaning of words (such as "k—g" and "c—n") obviously referring to the sovereign; that whether the language was true or false was immaterial; and that whether it was seditious was

an inference of law for the court. Should the jury render a verdict of guilty and the court find the language not libelous, judgment would be arrested. "The liberty of the press," he said, "is that a man may speak what he pleases without a licenser" (20 *Howell's State Trials*, 836, 893, 895, 896, 903).

Almon was convicted and punished. In the other cases, however, though the evidence of publication was clear, the juries declined to find the defendants guilty of seditious libel.

Junius' letter to the King contained passages which, *mutatis mutandis*, might support a conviction in New York for criminal anarchy. A large part of the letter relates to the case of Wilkes. It says (20 *Howell's State Trials*, 805-814) as to the situation created by Wilkes' expulsion from Parliament that

"It is not in the nature of human society that any form of government in such circumstances can be long preserved."

Then follows a passage peculiarly interesting to Americans in the period between the Stamp Act and the Revolution:

"If the English people should no longer confine their resentment to a submissive representation of their wrongs; if, following the glorious example of their ancestors, they should no longer appeal to the creature of the constitution, but to that high being who gave them the rights of humanity, whose gifts it were sacrilege to surrender, let me ask you, sir, upon what part of your subjects would you rely for your assistance?  
\* \* \* The distance of the colonies would make it impossible for them to take an ac-



tive concern in your affairs, if they were as well affected to your government as they once pretended to be to your person. \* \* \* They know how to distinguish the s——n and venal p——t on one side, from the real sentiments of the English people on the other. \* \* \* They left their native land in search of freedom, and found it in a desert. Divided as they are, into a thousand forms of policy and religion, there is one point in which they all agree: they detest the pageantry of a k——g.”

Junius ironically suggested that a House of Commons, once started on the path of usurpation (by the expulsion of Wilkes), might follow the example of the Long Parliament:

“The same pretended power which robs a subject of his birthright may rob an English k——g of his c——n.”

The greater danger, however, is from the people:

“When the complaints of a brave and powerful people are observed to increase in proportion to the wrongs they have suffered, when, instead of sinking into submission, they are roused to resistance, the time will soon arrive when every inferior consideration must yield to the security of the sovereign and the general safety of the state.”

The failure, on the whole, of the Junius prosecutions was applauded in England by a powerful party. That party set on foot the movement which resulted, twenty years later, in Fox's Libel Act (32 Geo. III, Chap. 60, 1792)—an act which by empowering jurors (who would be peculiarly influenced by the average man's understanding and

feeling as to surrounding circumstances) to determine the seditious character of the writing, was an approach towards the principle that circumstances have a bearing upon criminality.\* This party was, moreover, the party friendly to the grievances of the American colonists—the party which aided and encouraged American representatives, and presented their case in Parliament.

No less interesting to American colonials than these prosecutions for views with which they sympathized was a prosecution growing out of the events of the American Revolution itself. In *Rex v. Horne* (better known by his subsequent name of Horne Tooke), 20 Howell's St. Tr. 651, Cowp. 672 (1777), the alleged libel was "an announcement that a collection had been made for the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the King's troops at or near Lexington and Concord in the province of Massachusetts on the 19th of April last."

Lord Mansfield, departing from his former practice,† left the construction and intent of the libel to the jury, saying that, if it was a criminal arraignment of the king's troops, they would find their verdict one way; but that if they were of opinion that the contest was to reduce innocent subjects to

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\* It was far, of course, from establishing a safe and definite principle of construction in the light of circumstances for the guidance of juries. In *Rex v. Cuthell*, 27 Howell's State Trials, 675, Lord Kenyon frankly stated the law to be that

"a man may publish anything which twelve of his countrymen think is not blamable."

† As Hamilton and Chancellor Kent pointed out in the *Crosswell case*, 3 Johns. Cases 421, p. 92, *infra*.

slavery, and that they were all murdered, then they might form a different conclusion with regard to the meaning and application of the paper. Horne was convicted.

So much for the English seditious libel prosecutions which Americans resented. Concurrently with them (1765-1769) appeared the first edition of Blackstone's *Commentaries*.

The "liberty of the press" which Blackstone formulated after the Wilkes case and while the Junius cases were pending was little more than a recognition that the censorship was definitely extinct and that no license to publish was required. Such recognition had not easily come about. In 1679, during a temporary lapse of the Licensing Act, the courts had held that an unlicensed publication of news was a crime at common law (*Carr's Case*, 7 St. Tr. 929); and after the Licensing Act had lapsed forever in 1695, the struggle to renew it continued through several sessions of Parliament (2 *May, Const. Hist.*, Chap. IX, 105-106). By Blackstone's time all thought of re-establishment of censorship had been abandoned. Recognizing this, and approving the Wilkes and Junius prosecutions, he argued that the liberty of the press, "properly understood," was not inconsistent with such prosecutions:

"In this, and in other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punished by the English law, some with greater, others with less degrees of severity, the liberty of the press, properly understood, is by no means infringed or violated.

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraint upon publication, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish, as the law does at present, any dangerous or offensive writings which, when published, shall on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order of government and religion, the only solid foundations of civil liberty."

*IV Bl. Com. 151.*

"Mr. Justice Blackstone, we all know, was an anti-republican lawyer," said Willes, J., in 1784 (in the *Dean of St. Asaph's Case*, 4 Douglas 73, 172, 3 T. R. 428). He earnestly supported the taxation of the American colonies without allowing them representation. He had progressed only so far in religious toleration as to believe that the officers of the Established Church should have power "to censure heretics, but not to exterminate or destroy them" (IV Bl. Com., 1st ed., Chap. IV, 49). He

did not question witchcraft, or the law as to that crime (*op. cit.*, p. 60).\*

Distinguished as Sir William Blackstone and Lord Mansfield are in the ordinary fields of private law, and correct as they were in their statements of the contemporary meaning of "liberty of the press" under the law of England, their statements have not been taken as definitive of the liberty of the press established by the American Revolution.

*2. American feeling for an absolute immunity of political doctrine per se was expressed in various colonial charters and statutes, in the refusal of colonial juries to indict or convict for seditious libel, and in the agitation which preceded the American Revolution; and an inalienable right to criticize government, however fundamentally, and advo-*

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\* Blackstone's view of this subject evoked contemporary criticism even in England (*Furneaux, Letters to Blackstone*, 1770—republished in Philadelphia in 1773). It never obtained general acquiescence. It was indirectly through the libel cases (which included prosecutions for advocacy of universal suffrage—*Rex v. Palmer*, 32 Howell's St. Tr. 237, 391, 602; 2 May, *Const. Hist.*, Chaps. IX and X) a subject of controversy for over fifty years; and has finally been quietly superseded in England by the views quoted *supra* from Sir James Fitzjames Stephen and Lord Coleridge.

The artificial character of Blackstone's limitation of liberty of the press has been often pointed out (2 *Story on the Constitution*, Sec. 1886; *Cooley, Const. Lim.*, 6th Ed., 603-604; *Pound, Equitable Relief against Defamation*, 29 Harv. L. Rev. 651; *Schofield*, 9 Proceedings Am. Sociological Soc. 67). It was recognized by this Court in the Espionage Act cases (*Schenck v. U. S.*, 249 U. S. at p. 51). Many State decisions are inconsistent with it (see *Louthan v. Com.*, 79 Va. 196; *Ex parte Harrison*, 212 Mo. 88; *State ex rel. Metcalf v. District Court*, 52 Mont. 46). Blackstone's test is wholly inapplicable to modern conditions. It would exclude censorship of news in time of war or censorship of films (see *Mutual Film Corp. v. Ind. Com. of Ohio*, 236 U. S. 230, 241). It would apparently permit punishment for a true report of legislative proceedings, or criticism of a dominant political party.

*cate changes, by any collective means, was asserted by the Declaration of Independence.*

It was for two reasons natural for the American colonists to repudiate the conception of liberty of doctrine then prevailing in England. The common law rules were inappropriate to the conditions of colonists who had emigrated to find freedom. And Americans could see, as did Englishmen, that those rules were in a state of transition.

Men who left their homes in search of religious freedom brought with them an antipathy towards a law of seditious libel which protected the Established Church as a state institution. Advocacy of the religious doctrines which they came here to practice was itself seditious libel in England at the time of their migration (*Atwood's Case*, 2 Rolle's Abridgment 78; *Croke's Reports*, James I, p. 421; *Prynne's Cases*, 3 Howell's St. Tr. 563, 714). Later, their protests here against the conduct of officers of the Crown were often threatened, and sometimes visited, with prosecution. They resented the prosecution in England of advocates of their own theories of the rights of the people. The "beloved American fellow-subjects" of Horne Tooke would hardly accept a principle which made the avowal of sympathy for them a basis of prosecution. And, after founding a republic in which the government is the servant of the people, they would hardly take from an "anti-republican lawyer" a principle of freedom of expression limited in the interest of the theory that the people are the servants of the sovereign.

The colonists, again, knew the course of affairs in England. They had seen the prosecution of the *Seven Bishops* (12 Howell's State Trials, 183, 433)

for the seditious libel of impugning the "dispensing power" of King James II—the theory immediately thereafter repudiated by the Revolution of 1688. They had seen Locke publish with impunity in 1690 the democratic doctrines for which Algernon Sidney had been executed in 1683 (9 Cobbett's State Trials 817)—the doctrines which they restated in the Declaration of Independence.\* They knew that the harsh law of England had passed through stages of greater severity, when it was a capital crime (constructive treason) to "compass or imagine" the *civil* death of the king—as by saying that his predecessor was still alive (*Constable's Case*, 2 and 3 Philip and Mary; see Sir Bartholomew Shower's defenses of the convictions of Algernon Sidney and Lord Russell, 9 Cobbett's State Trials, pp. 717 *et seq.*), and when it was a crime to publish anything without the *imprimatur* of the Licensor. If the colonists rejected the English law of disaffection as it stood at a particular moment, it would be no more than Englishmen had done and were doing.

It was not only natural, but inevitable, that American independence should establish a broad liberty of political doctrine.

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\* "Locke, like his master" (Hobbes) "derived political authority from the consent of the governed, and adopted the common weal as its end. But in the theory of Locke the people remain passively in possession of the power which they have delegated to the prince, and have the right to withdraw it if it be used for purposes inconsistent with the end which society was formed to promote. To the origin of all power in the people, and the end of all power for the people's good—the two great doctrines of Hobbes—Locke added the right of resistance, the responsibility of princes to their subjects for a due execution of their trust, and the supremacy of legislative assemblies as the voice of the people itself."

Green, *Short History of the English People*, Ch. IX, Sec. 1.

(a) *Colonial charters and statutes as to freedom of religious doctrine.*

Before the middle of the seventeenth century, by the Toleration Act of 1649, the Catholic founders of Maryland had led the way in adopting the principle of toleration of antagonistic doctrines. Other colonies also made provisions for religious freedom.

*Rhode Island Charter, 1663.*

*New York, Articles of Capitulation of the Dutch, Aug. 27, 1664, 2 Laws of N. Y., Revision of 1813, Appendix, p. I.*

*New York Charter of Liberties, 1683, 2 Laws of N. Y., Revision of 1813, Appendix, pp. V, VI.*

*New York Act of May 13, 1691, Acts of Assembly passed in the Province of New York (Ed. Bradford, 1726), p. 5.*

*Pennsylvania Charter, 1680.*

*Georgia Charter, 1732.*

Some of the laws enacted a positive liberty whose exercise could be subject to punishment only when it broke out in actual breach of the peace. The Rhode Island Charter conditioned religious liberty as follows:

“ \* \* \* they behaving themselves peaceable and quietlie, and not using this libertie to lycentiousnesse and profanenesse, nor to the civill injurys or outward disturbance of others.”

2 *Rhode Island Col. Records, 3-21; MacDonald, Documentary Source Book of American History, 1606-1913, pp. 66-72.*



The New York Charter of Liberties of 1683 provided that:

"No person or persons which professe ffaith in God by Jesus Christ, shall at any time, be any ways molested, punished, disquieted, or called in question for any difference in opinion or matter of religious concernment, *who do not actually disturbe the civil peace* of the province, but that all and every such person or persons may, from time, and at all times, freely have, and fully enjoy, his or their judgments or consciences in matters of religion throughout all the province, they behaving themselves peaceably and quietly, and *not using the liberty to licentiousnesse nor to the civil injury or outward disturbance of others.*"

To the same effect is the New York Act of May 13, 1691.

There was thus early in the history of the colonies a feeling for a positive immunity of doctrine up to the point where it actually disturbed the peace. Jefferson probably had in mind these early colonial charters and statutes when, in 1786, he drafted the Virginia Toleration Act—in which he said there was not a single new idea. This act (which, although not a colonial statute, may be cited here in view of its relationship) declared:

"That to suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being, of course, judge of that tendency, will make his opinion the rule of judgment, and approve or condemn the sentiments of others

only as they shall square with or differ from his own. It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

12 *Hening's Stat. of Virginia*, 84; cf. *Reynolds v. United States*, 98 U. S. 145, 163.

(b) *Seditious libel in the colonies.*

More directly in point than this record of legislation is the judicial history of the colonies upon the precise point of prosecution for seditious libel. At a time when such prosecutions flourished in England, they were rare in the colonies and opposition to them was determined. It appeared alike when prosecutions were instituted by officers of the Crown and when they were instituted by the colonists' own popularly elected legislatures. The difference in procedure in the colonies is significant of a different attitude towards the offense. In England, prosecution for seditious libel was always by information (2 *May, Const. Hist.*, Chap. IX). In the colonies it was regularly (with occasional exceptions) by indictment.

In spite of the urgency of the Governor and Council, the Massachusetts House declined in 1721 to pass an "Act for Preventing of Libels and Scandalous Pamphlets, and for Punishing the Authors and Publishers thereof."

*Dunaway, Freedom of the Press in Massachusetts*, 96.

In default of legislation, grand juries quite generally refused to find indictments for seditious libel, notwithstanding the importunities of legislatures or officers of the Crown.

*James Franklin's Case, Mass., 1723, Duniway, op. cit. 101.*

*Fleet's Case, Mass., 1742, Duniway, op. cit. 114.*

*Fowle's Case, Mass., 1754, Duniway, op. cit. 115-119.*

*Zenger's Case, New York, 1734, Livingston Rutherford, John Peter Zenger.*

When indictments were found, or when prosecution was by information, acquittals were usual.

*William Bradford's Case, Pa., 1692; 2 Thomas, History of Printing, 10-24, Duniway, op. cit. 110 n.*

*Thomas Maule's Case, Salem, 1695, Duniway, Freedom of the Press in Mass., 73.*

*The Case of John Peter Zenger, New York, 1734, Livingston Rutherford, John Peter Zenger; 17 Howell's State Trials, 675.*

James Franklin's case, *supra*, was noteworthy. He was the older brother of Benjamin. He attacked, not the royal governor, but the legislature of Massachusetts—the popular representative body elected by the people. That body imprisoned him by legislative edict. Upon his release he published a doggerel satire on the proceedings with impunity.

The most famous prosecution was that of Zenger, the New York printer. His libel was an attack upon Governor's Cosby's administration. The Court (De Lancey, C. J.) charged the jury in the exact language of Lord Holt in *Tutchin's Case* (*supra*, p. 48). Though he urged the jury to leave to the Court the construction of the libel, they returned an unqualified verdict of not guilty. Mr. Rutherford (p. 249) lists fourteen editions of the report of this trial published during the eighteenth cen-

tury. Andrew Hamilton's defense of Zenger was a persuasive vindication of the right to breed an ill-opinion of government by criticism. "It is doubtful if any case in America had a more thoroughly interested and attentive audience. \* \* \* This event has been called 'the Morning Star of that Liberty which subsequently revolutionized America'" (13 *Nat. Encyc. of Amer. Biog.*, 298-299).

(c) *The Pre-Revolutionary agitation and the Declaration of Independence.*

The agitation preceding the American Revolution was in its whole quality a denial of the law of seditious libel. American writers and speakers freely stated the principles (adapted from Locke, but still repugnant to English constitutional practice) that government exists for the good of the governed, and that governments subversive of this end should be opposed. The Massachusetts agitators included James Otis, Samuel and John Adams, John Hancock, Joseph Warren and Josiah Quincy. Town meetings instructed their delegates to the General Court to "take special care of the liberty of the press" (*Dunaway, op. cit.* 123-124)—which, under the circumstances, was a liberty of disaffection.

American patriots used with impunity language almost identical with that for which the printers of Junius were prosecuted. Otis, in the controversies over the Writs of Assistance and the Stamp Act, in phrases that recall the equally famous sedition (as English lawyers would have branded it) of Patrick Henry, likened the royal abuses of power in America to those which had "cost one

king of England his head, another his throne." \* He declared that Parliament could not legalize an invasion of "natural" rights—the rights now protected both by specific constitutional limitations and by the due process clause. He even implied that disobedience of laws invasive of natural rights would be justifiable. He said:

"Parliament cannot make two and two five. \* \* \* Parliaments are in all cases to declare what is for the good of the whole; but it is not the declaration of Parliament that makes it so. There must be in every instance a higher authority, God. Should an act of Parliament be against any of His natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity, and justice, and consequently void."

He said that government is a trust for the good of mankind, each society being at liberty to establish such a form as it might deem best. "If a government is unfaithful to its trust, it should be opposed."

*Otis, The Rights of the Colonies Asserted and Proved*, 1764,—reprinted in London in the same year by John Almon, the same who was convicted for publishing Junius' Letter to the King.

*William Tudor, James Otis*, Boston, 1823, App. p. 500.

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\* Otis was the Attorney General of Massachusetts. He resigned his office in order to assert in the courts the invalidity of the Writs of Assistance. His speech was reported by John Adams (*Works*, i., App. A, 523; cf. Vol. X, 183, 233, 244, 256), who said: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born" (quoted in *Boyd v. United States*, 116 U. S. at p. 625).

For such "seditious libels" Chief Justice Hutchinson of Massachusetts tried to get indictments on Blackstonian principles. In a charge to the grand jury in 1767 he said:

"Pretty high Notions of the Liberty of the Press, I am sensible, have prevailed of late among us; but it is very dangerous to meddle with, and strike at this Court.

The Liberty of the Press is doubtless a very great Blessing; but this Liberty means no more than a Freedom for every Thing to pass from the Press without a license. \* \* \* To carry this absurd Notion of the Liberty of the Press to the Length some would have it—to print every Thing that is Libelous and Slanderous—is truly astonishing. \* \* \*

Formerly, no Man could print his Thoughts, ever so modestly and calmly, or with ever so much Candour and Ingenuousness, upon any Subject whatever, without a License. When this Restraint was taken off, then was the true Liberty of the Press" (*Duniway, op. cit.* 125, 128-129).

The freest government in Europe, he said, would not tolerate the freedom used in the Boston papers.

Officials of other colonies also complained of the prevalence of libelling. But all attempts to get indictments on Blackstonian principles failed. No indictments were returned, and the press responded with assertions of its freedom.\*

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\* *Duniway, op. cit.*, 123-128, citing as to New York and Pennsylvania, *New Jersey Archives*, XI, XII, XIV, *passim*; *Magazine of History*, July, 1905, p. 65. The material from Massachusetts is particularly significant, as that colony, as compared with some of the others, had been slow in sanctioning the liberty to differ. It is to be regretted that, in default of research such as President Duniway's in Massachusetts, the material in the other colonies is not readily accessible (*Duniway, op. cit.*, v.). The greater boldness of dissent in the southern colonies was noted by Burke at the time in his *Speech on Conciliation*.

The tendencies separately manifested by the colonies appeared in their collective action in the new struggle. One of the first acts of the Continental Congress in 1774 (*Journals*, Vol. I, p. 57) was a declaration of five "invaluable rights without which a people cannot be free and happy." One of these was the freedom of the press, whereby (contrary to the theory of the law of England that the danger of an ill-opinion of government outweighed the benefits of just criticism of officials),

"oppressive officers are shamed into more honorable and just modes of conducting affairs."

Two years later came the Declaration of Independence. It is important for the phrases in which it asserted natural rights. It is important also as a supreme exercise and effectuation of the natural rights asserted:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness,—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."

Such was the conception of liberty of the American people when they achieved independence. It is unthinkable that men who not only asserted but acted upon such principles could carry over into a government based upon them a principle of Eng-

lish law under which mere advocacy of disaffection was a crime.\*

(3) *The rights established by the Declaration of Independence were confirmed by the State Constitutions.*

The right under all ordinary circumstances to advocate anything whatsoever of a public nature was secured generally by the nature of our government and by the repetition in State Constitutions of the principles of the Declaration of Independence, and specifically by provisions for freedom of speech and press.

During the Revolution one state after another included in its constitution explicit reiterations of the principles of the Declaration of Independence as to the nature of government and the rights of the sovereign people (Virginia, 1776, *Poore, Charters and Constitutions*, 1908; Pennsylvania, 1776, *op. cit.* 1540; Maryland, 1776, *op. cit.* 817; New Jersey, 1776, *op. cit.* 1310; North Carolina, 1776, *op. cit.* 1409; New York, 1777, reciting the entire Declaration of Independence, *op. cit.* 1328-1332; Vermont, 1777, *op. cit.* 1860; Massachusetts, 1780, *op. cit.* 975). Most of the state constitutions also included free speech and press clauses (Virginia, 1776, *op. cit.* 1909; Pennsylvania, 1776, *op. cit.* 1542; Delaware, 1776, *op. cit.* 277; Maryland, 1776, *op. cit.* 820; New Hampshire, 1776, *op. cit.* 1282; North Carolina, 1776, *op. cit.* 1410; Vermont, 1777, *op. cit.* 1860; Georgia, 1777, *op. cit.* 383; South

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\* For the relation between the "inalienable rights" then declared and "liberty" in the Fourteenth Amendment, see the language of Bradley, J., in *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; see also *Allgeyer v. Louisiana*, 165 U. S. 578.



Carolina, 1778, *op. cit.* 1627; Massachusetts, 1780, *op. cit.* 959).\*

It was obviously the very liberty of expression which had been used by American patriots in the pre-revolutionary agitation—an incident to the “inalienable rights” of liberty and the pursuit of happiness so integral that its separate declaration was a matter of superabundant caution rather than of necessity—that the state governments, both by their nature and by their constitutions, guaranteed to all citizens.

(4) *The rights established by the Declaration of Independence were exercised in the adoption of the Federal Constitution and confirmed as principles of federal constitutional law as against federal attack by the Bill of Rights.*

The establishment of the Federal Constitution, imperative as it was from the necessities of the time, was itself an exercise of the right asserted in the Declaration of Independence to alter or abolish a system of government. It was accomplished, over determined opposition, by an intelligent and effective agitation against the form of government existing under the Articles of Confeder-

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\* Connecticut and Rhode Island remained under their colonial charters until long after the Revolution. As to the New York theory that the liberty of the press was secured by the nature of government by the people, without explicit declaration, see footnote, p. 13, *supra*.

The constitution first proposed for Massachusetts in 1778 failed of ratification because it contained no bill of rights; there is documentary evidence of objection by the towns on the precise ground that

“by a Constitution the printing presses ought to be declared free for any Person who might undertake to examine the proceedings of the Legislature or any part of Government” (*Dunaway, op. cit.*, 133).

ation—open disaffection towards it. Means which, though orderly, were unlawful in the sense that they disregarded the provisions of the Articles of Confederation for amendment, were advocated and employed.

The Articles of Confederation provided (Art. XIII) that

“the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.”

The Constitution could hardly have been peacefully adopted and established had Hamilton and Madison not been free to breed disaffection towards the Confederation and advocate its alteration by unlawful means. The conditions which made their agitation a tremendous service are well known—insolvency of both government and citizens, unsound financial and commercial legislation by many states, Shays' Rebellion in Massachusetts and unrest elsewhere, interstate jealousy and friction, commercial stagnation, the incompetence and inadequacy of government under the Articles of Confederation.

These conditions explain why drastic action was necessary. They do not qualify the fact that the action was drastic.\*

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\* We believe that the best general accounts of the adoption of the Constitution and the contest for ratification are those in *Beveridge, Life of Marshall*, Vol. I, pp. 242-479; *Fiske, Critical Period*, 213-350; *Farrand, The Framing of the Constitution*.

The movement for the Constitution proceeded through a series of conferences between delegates from a few States—that of 1785 at Mount Vernon, relating primarily to the navigation of the Potomac; and that of 1786 at Annapolis, relating primarily to the Delaware-Chesapeake Canal and uniformity of customs duties. Following the Annapolis conference, Congress called a convention of all the States

“to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union, and to report to Congress such an act as, when agreed to by them, *and confirmed by the legislatures of every state*, would effectually provide for the same”

—in other words, to amend the Articles of Confederation by the procedure prescribed in Article XIII.

The Constitutional Convention of 1787 agreed, notwithstanding, that the Constitution should go into effect when ratified by *nine* States, instead of thirteen; and that ratification should not be by State legislatures as provided by the Articles of Confederation and by the resolution of Congress calling the Convention, but by State conventions. The Convention deemed it important that the Constitution should derive its sanction directly from the people in accordance with the principles of the Declaration of Independence (*Farrand, Records of the Constitutional Convention*, Vol. I, p. 126; Vol. II, pp. 88, 556; Vol. III, pp. 137, 159).

The revolutionary character of the proceeding was clearly perceived and vehemently denounced by the opponents of the Constitution, both in the press and in the State conventions. It was frankly de-

fended by the supporters of the Constitution as an exercise of the inalienable right to alter and abolish governments established by the Declaration of Independence. Thus Madison said that too insistent a regard for technicalities of procedure

“would render nominal and nugatory the transcendant and precious right of the people ‘to abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.’ ”

He declared it to be

“essential that such changes be instituted by some informal and unauthorized propositions made by some patriotic and respectable citizen or number of citizens.”

*Federalist*, No. 40.

The Constitution went into effect with the ratification, not of thirteen, but of only eleven States. Rhode Island and North Carolina had refused to ratify. The new government, violating the “invincible” perpetual Confederation, simply proceeded without them. Of this Judge Cooley says:

“The action of the eleven states in making radical revision of the Constitution and excluding their associates for refusal to assent, was really revolutionary in character, and only to be defended on the same ground of necessity on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government.”

*Cooley, Constitutional Limitations*, 7th Ed., 9-10.

The precise process—"really revolutionary in character"—by which the Constitution was adopted is a process whose advocacy the Trial Court expressly held forbidden by the New York Criminal Anarchy Law. The reference to unlawful means in the act, he charged the jury, was not qualified by its association with force or violence. Advocacy of overthrow by any means other than constitutional amendment was prohibited (Record, p. 53; cf. Appellate Division opinion, Record, p. 208).

This case does not call for the contention that there is a right of revolution, much less for the contention that there is a legal right of revolution. We make no such contention and cite the history of the Revolution and of the adoption of the Constitution simply as showing in what sense the right to state and advocate doctrine must have been understood by the framers of the Declaration of Independence and of the state and federal Constitutions. Men who themselves advocated the overthrow first of British rule and then of the government created by the Articles of Confederation must have conceived that the right of free speech and free expression involved the right to advocate changes of government by unlawful means.

We have stated the argument that rests upon the circumstances in which the Constitution of the United States was drafted. We turn to a history of the contest over its ratification by the conventions of the states, which resulted in another clear confirmation of these principles as principles of the new government.

Seven states, none of them large, ratified readily. Pennsylvania ratified decisively, but over bitter opposition. In two States ratification failed.

The three remaining States, Massachusetts, New York and Virginia, with North Carolina and Rhode Island, represented about three-fifths, or a little less than two million, of the total population of a little over three million.

In Massachusetts, New York and Virginia the opponents of the Constitution had probably an initial majority. Their principal motive was the feeling that so powerful a mechanism of government would prove subversive of the principles of the Declaration of Independence.\* In all three of these states ratification was finally procured, by narrow margins,† by a form of resolution (proposed in each case by the Federalists) stating that the Constitution was ratified upon the understanding that certain "explanations," specified in the resolution, were consistent with it. These "explanations" were statements in the nature of bills of rights, reserving the liberty established by the Declaration of Independence. All of them included declarations in favor of freedom of the press.

1 *Elliott's Debates*, Ed. 1881, pp. 322-323 (Mass.); *ibid*, p. 327 (New York and Virginia).

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\* See particularly the speeches of Melancthon Smith, one of the most moderate and intelligent of the Anti-Federalists, whose final shift to the Federalists brought about ratification by New York, 1 *Elliott's Debates*, Ed. 1827, pp. 221-225, 228, 297; see also the speeches of Patrick Henry in the Virginia Convention, and a multitude of expressions by obscure delegates in the Massachusetts Convention, 1 *Elliott's Debates*, Ed. 1827, *passim*.

† The dates and votes were as follows:

Massachusetts, Feb. 6, 1788, 187 to 168.

Virginia, June 25, 1788, 89 to 79.

New York, July 26, 1788, 30 to 27.

The Virginia "explanation" as to construction recites the understanding

"that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whenever the same shall be perverted to their injury or oppression; and that every power not granted thereby remains with them and at their will \* \* \* and that, among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States."

1 *Elliott's Debates*, Ed. 1881, p. 327.

The ratifications by North Carolina and Rhode Island, after the Constitution was in effect (November 21, 1789, and June 16, 1790, respectively), were upon similar interpretative explanations, covering liberty of the press (1 *Elliott's Debates*, Ed. 1881, 331-337).

Without these "explanations," confirming the principles of the Declaration of Independence, it is certain that neither Massachusetts, Virginia, nor New York would have ratified. In each of these States the loss on final ballot of from two to four per cent. of the delegates would have prevented ratification. Had any of these three States (New York being a geographical keystone, Massachusetts and Virginia the largest, but for Pennsylvania, in the Confederation) definitely refused to ratify, the Constitution would have been unlikely to go into effect without a civil war. The "explanations" were essential.

These explicit declarations of civil and political liberty were proposed and concurred in by the Federalist sponsors of the Constitution. The subsequent adoption in 1791 of the first ten

amendments, including recognition not only of freedom of speech and press, but of the reserved powers of the people, guaranteed their good faith. It amounted to a ratification of the principles of inalienable political liberty upon which the revolution was based, as those principles were popularly understood, free of "speculative and refined" constructions. Freedom of expression had the same association with the principles of the Declaration of Independence that it had in the state constitutions. Its meaning is determined by reference to its historical origin in American constitutional law, in the light of "the necessities which gave birth to the constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption" (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 428, 558; *Missouri v. Illinois*, 180 U. S. 208, 219; *Knowlton v. Moore*, 178 U. S. 41, 95). In this light it is clear that freedom of expression extends to drastic advocacies with relation to government.

It was free speech in the light of the Declaration of Independence—freedom to advocate drastic change by means which the New York courts would to-day hold unlawful—that was used in procuring the ratification of the Constitution. This freedom was already established in the states both by express constitutional provisions and by the nature and origin of the state governments. It is an attribute of free government as fundamental and as immune from arbitrary interference in the absence of circumstances of necessity or danger as the right of private property. It was used, as of right and of course, by citizens of all the states in 1788. No state (though in several of them the influence of the Anti-Federalists was preponderant prior to the



ratifying conventions) even considered restraining its use by prosecutions in the nature of seditious libel.

The Bill of Rights amendments recognized the existence of this liberty in the states, and guaranteed it against federal encroachment. The Fourteenth Amendment "furnishes an additional guarantee against any encroachment by the states" (*Cruikshank v. United States, Butchers Union Co. v. Crescent City Co., Allgeyer v. Louisiana, supra*, Point I).

The adoption of the Constitution proved that such a liberty is both safe and beneficial. Deeply as the people had been imbued with economic fallacies, the vision and intelligence of the community (always initially a minority), appealing to the good sense of the community, had succeeded in a single campaign in swinging a majority to sound principles and in convincing them of the necessity of enforcing those principles even in disregard of the then organic law of the Confederation. They could not so quickly have succeeded had not advocacy of unsound principles and courses been allowed an equal latitude. The extremes of economic fallacy which had culminated in Shays' Rebellion in Massachusetts\* and the commercial paralysis of Rhode Island through a fiat money forcing act had furnished object lessons for the need of sound government more persuasive than the logic of the Federalist. Our subsequent history has shown† that un-

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\* A movement for repudiation of debts.

† See, for example, the successive collapses of Know-Nothingism, Greenbackism, and Populism.

der constitutional checks the good sense of the whole people will reject subversive movements before they have gone so dangerously far towards effecting themselves as those of 1786. The fallacies of 1786 had sprung from real distresses calling for remedy. The distress of the uninformed can often find little expression except through quacks and demagogues. Had not the bad sense of the community been free to urge its dangerous remedies, good sense would not so readily have been stimulated to adopt the sound remedy of strong government and prosperity, and to confirm the right to advocate even dangerous doctrines as its best ultimate security.

#### POINT V.

**The New York statute rests upon the same principle as the Federal Sedition Law of 1798—a principle which this Court and every department of the government subsequently condemned upon constitutional grounds.**

We have discussed the legal principles and in broad outline the relevant constitutional history of the right of free expression. It remains to note the only departure, prior to the New York statute, from the constitutional policy that political expression may not, *per se*, be a subject of prosecution, and how definitely that departure was repudiated as constitutionally unsound by every department of American government—specifically by the people, the Executive, and Congress, and in principle by jurists of high authority and finally by this Court.

(a) *The Sedition Law of 1798.*

The Sedition Law of 1798 provided :

"Sec. 2. And be it further enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars and by imprisonment not exceeding two years.

Sec. 3. And be it further enacted and declared, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause

to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

Sec. 4. And be it further enacted, That this act shall continue and be in force until \* \* \* (March 3, 1801) \* \* \* and no longer: Provided, that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law, during the time it shall be in force."

*Act of July 14, 1798, 1 Stats. at Large 596.*

The Sedition Law was passed as part of the preparation for the war with France—a revolutionary power whose "Jacobinical" ideas as advocated by the Jeffersonian Republicans were believed by the Federalists to threaten our institutions. Politics were heated. Democracy was characterized by leading Federalists as a "disease." The preservation of the nation was identified with the continuance of Federalist political predominance.

The feelings of the time were reflected even by judges upon the bench. The Chief Justice of Massachusetts, charging a grand jury, denounced

"the French system-mongers, from the Quintumvirate of Paris to the Vice President" (Jefferson) "and minority of Congress, as apostles of atheism and anarchy, bloodshed and plunder."

*Francis Wharton, State Trials, Int., p. 47.*

Justice Iredell concluded a charge to the grand jury at Philadelphia in 1798 with a panegyric upon the Federalist administration, described as "our government," to which

"the only crime which is fairly imputable is, that the minority have not been suffered to govern the majority, to which they had as little pretension upon the ground of superiority of talents, patriotism, or general probity, as upon the principles of republicanism, the perpetual theme of their declamation. If you suffer this government to be destroyed, what chance have you for any other? A scene of the most dreadful confusion must ensue. Anarchy will ride triumphant, and all lovers of order, decency, truth and justice be trampled under foot. May that God, whose peculiar providence seems often to be interposed to save these United States from destruction, preserve us from this worst of all evils. And may the inhabitants of this happy country deserve his care and protection by a conduct best calculated to obtain them!"

*Wharton, State Trials, 481.*

Judicial feeling on political questions ran so high that judicial expressions were often printed and circulated as campaign documents. See

*Wharton, State Trials, Introduction, p. 47.*

*3 Beveridge's Marshall, pp. 29 et seq.*

There were only about twenty-five arrests under the Sedition Law and ten trials, all resulting in convictions. The most severe sentence was of eighteen months in prison and \$400 fine. Only four of the trials were fully reported.

*U. S. v. Matthew Lyon*, Oct., 1798, Whar-  
ton, *State Trials*, 333.

*U. S. v. Anthony Haswell*, 1800, *ibid.* 684.

*U. S. v. Thomas Cooper*, 1800, *ibid.* 654.

*U. S. v. James Thompson Callender*, 1800,  
*ibid.* 688.

Such information as is accessible as to the other  
cases is contained in

*Anderson, Enforcement of the Alien and  
Sedition Laws, Annual Report of the  
American Historical Association*, 1912,  
pp. 115 *et seq.*

3 *Beveridge, Life of Marshall*, pp. 41 *et  
seq.*

*Allan McLane Hamilton, Life of Alex-  
ander Hamilton*, pp. 444 *et seq.* (indict-  
ment of Duane).

The constitutionality of the Sedition Law was  
never tested by an appeal. Indeed there is little  
constitutional discussion in the reported trials. No  
act of Congress had ever, at that time, been held  
unconstitutional; the case of *Marbury v. Madison*  
(1 Cranch 137) did not arise until 1803. Consti-  
tutional construction was in general a subject of  
political controversy. The only forum in which the  
constitutional questions involved in the Sedition  
Law could be fought out was the forum of politics.  
They were fought out in the legislatures, in Con-  
gress, and in the election of 1800.

At bottom, the issue was whether freedom of  
speech and press was to be construed in the light  
of Blackstone and the common law, or in that of  
the Declaration of Independence.

The Federalists argued that freedom of speech and press in our system meant exactly what it had meant at eighteenth century common law as stated by Blackstone (see p. 54, *supra*)—freedom from censorship, but with a right of the government to punish after publication whatever it might brand as of ill tendency. They asserted the theory that there was a federal common law of crimes in the United States, including the common law crime of seditious libel. *A fortiori*, therefore, it was within the implied powers of Congress to temper the harsh common law of seditious libel by the Sedition Law.

The justices of the Supreme Court had severally gone on record for the proposition that acts injurious to the government were punishable in the courts of the United States at common law:

- Chief Justice Jay's charge to the grand jury at Richmond, May 22, 1793, Wharton State Trials, 38; 3 Johnston, Corr. c. of Jay, 478-485.*  
*U. S. v. Henfield, Wharton St. Tr., 83-89.*  
*U. S. v. Warall, ibid. 189, 197; 2 Dallas 34 (1798).*  
*U. S. v. Williams, Wharton St. Tr., 652.*  
*Justice Wilson's charge at Philadelphia, July, 1793, 3 Works of James Wilson, 34; Wharton, State Trials, 60.*  
*U. S. v. Ravara, 2 Dallas, 297-299; Wharton State Trials, 90.*

On the theory that seditious libel was, on common law principles, a crime of federal cognizance without an express statute, the Federalists extolled the Sedition Law for its "lenity" in tempering the

common law by limiting the punishment to be imposed, by permitting evidence of truth, and by referring to the jury both the "law" (*i. e.*, the intent and construction) and the fact. It was on this theory of the "lenity" of the Sedition Act that Chief Justice Ellsworth ironically suggested that in case the repealing resolution of 1800 should pass, its preamble should read:

"Whereas the increasing danger and depravity of the present time require that the law against seditious practices *should be restored to its full rigor*, therefore," etc.

2 *Beveridge, Marshall*, 451-452.

See, also:

*Justice Iredell's Charge to the Grand Jury at Philadelphia*, April 11, 1799, Wharton, *State Trials*, 477.

Justice Iredell's charge to the grand jury at Philadelphia (the conclusion of which was quoted at p. 80, *supra*) was the leading argument in favor of constitutionality. Justice Iredell held, as did all the Federalist supporters of the act, that "freedom of the press" meant in American constitutions exactly what it meant in Blackstone (see p. 54, *supra*)—freedom from previous restraints upon publication, subject to punishment for dangerous or offensive writings when published. He, too, commended the "lenity" of the Sedition Act in tempering the common law. He thought that the danger of oppressive prosecution was met by the admission of evidence of truth. As to the argument based on the nature of our government, he said:



"It is said, libels may rightly be punishable in monarchies, but there is not the same necessity in a republic. The necessity in the latter case I can conceive greater, because in a republic more is dependent on the good opinion of the people for its support."

*Wharton, State Trials, 477.*

The Sedition Law was the subject of vast public comment and the state legislatures issued addresses attacking and defending it. The famous resolutions of the Virginia and Kentucky legislatures in 1798 and 1799 (drafted respectively by Madison and Jefferson) warmly denounced the statute as unconstitutional.

*4 Elliott's Debates, Ed. 1881, 528, 540.*

The Federalist legislatures of other states answered the Virginia and Kentucky Resolutions (*op. cit.* 532-538).

Madison's reply on behalf of the Virginia legislature (1800) is important not only as a cogent and temperate demonstration of the unconstitutionality of the Sedition Law, but also as a statement of the theory on which the people in the election of 1800 repudiated it. His main point is that American constitutional freedom of the press is to be construed in the light of the nature and history of our own government—the principles of the Declaration of Independence—not in that of Blackstone and the common law. He disposed incidentally of the argument that the privilege of giving evidence of truth, which even the Sedition Law extended and the common law withheld, substantially diminished the danger of oppressive prosecution. The administration of the statute had made it ob-

vicious that upon such questions as actually arose—whether the character of President Adams was arbitrary; whether Gideon Henfield, a seaman impressed into the British navy who had escaped and whom President Adams had “advised” the District Judge at Charleston to turn over to the English authorities, was or was not an American citizen—a jury of Federalists would find one way, a jury of Jeffersonian Republicans another.

On the main point—the inconsistency of the crime of seditious libel with the nature of American government—Madison said, after stating the Blackstonian definition of freedom of the press:

“It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

The essential difference between the British government and the American constitutions will place this subject in the clearest light.

In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate \* \* \* it is a principle, that the Parliament is unlimited in its power. \* \* \* Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their bill of rights, etc.—are not reared against their Parliament, but against the royal prerogative. \* \* \*

In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. \* \* \* The great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also; and this exception, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of the laws. \* \* \*

The nature of governments elective, limited, and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion, than may be tolerated by the genius of such a government as that of Great Britain. \* \* \* Is it not natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated? \* \* \* It has accordingly been decided, by the practice of the states, that it is better to leave a few of its obnoxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits."

His reference to the then recent history of the adoption of the Constitution sustains the argument advanced herein. He said:

"And can the wisdom of this policy be doubted by any one who reflects that to the press alone, checkered as it is with abuses,

the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflects that to the same beneficent source the United States owe much of the lights which conducted them to the rank of a free and independent nation and which have improved their political system into a shape so auspicious to their happiness? Had Sedition Acts, forbidding every publication that might bring the constitutional agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing, at this day, under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke? \* \* \* The freedom of conscience, and of religion, is found in the same instrument which asserts the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States."

To withhold power over the press was one expression of the "anxious circumspection" with which powers were granted and balanced—there is no other check than the press on abuse of some of them.

"And, in the opinion of the committee, well may it be said, as the resolution concludes with saying, that the unconstitutional power exercised over the press by the Sedition Act ought, 'more than any other, to produce universal alarm; because it is levelled against the right of freely examining public characters and measures, and of free com-

munication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.'"

4 *Elliott's Debates*, Ed. 1881, 570-580.

Marshall, as Federalist leader in the Virginia legislature, defended the constitutionality of the Sedition Law on Blackstonian principles in opposition to Madison. But when the question of its repeal came up in 1800 during his term in Congress, he was the only Federalist who voted for the repeal; the resolution for repeal (which failed in the Senate) carried the House of Representatives 50 to 48.

✓ "Had he voted with his party, the Republican attack would have failed. \* \* \* He had been and still was the only Federalist to disapprove, openly, the Alien and Sedition Laws."

2 *Beveridge, Marshall*, 451.

The Sedition Law marked the beginning of the political landslide which in 1800 swept the Federalist party out of power, and ultimately out of existence.

The Sedition Law was as definitely repudiated by the President and Congress as it had been by the people. Jefferson at once pardoned all those still serving sentences under it. In answer to a complaint from Mrs. Adams, Jefferson wrote in 1804:

"I discharged every person under punishment or prosecution under the Sedition Law, because I considered, and now consider, that law to be a nullity as absolute and as palpa-

ble as if Congress had ordered us to fall down and worship a golden image."

4 *Jeff. Corr.* 23; Wharton, *State Trials*, 719.

The expiration of the law by its own limitation in 1801 left no occasion for immediate action by Congress. But all fines imposed were remitted with interest in 1840.

*26th Congress, 1st Session, House Doc. No. 86.*

The principles of the Sedition Law, as we shall show, were repudiated by the courts as well. In one hundred years of history, during more than half of which discussion of secession was in one quarter or another almost constantly in the air, no attempt was made to revive its principles.

(b) *The disappearance of the common law theory of seditious libel*—*People v. Croswell*, 3 Johns. Cas. 421, and *United States v. Hudson*, 7 Cranch 32.

So much for the history of legislation. It remains to note the disappearance of the common law theory of seditious libel in the state courts and in this Court.

A few prosecutions in state courts for seditious libel went on the principles urged in support of the Sedition Act.

*Abijah Adams* was convicted in Massachusetts for common law seditious libel, for a laudatory newspaper report of a speech in the State Senate, in opposition to the proposed Massachusetts answer to the Virginia and Kentucky Resolutions. The

Court in pronouncing sentence, attacked the Virginia and Kentucky Resolutions and the principles of free press as "dangerous to public tranquillity."

*Records of Supreme Jud. Ct. of Mass., 1798-1799, 183-186; 3 Beveridge's Marshall, 44-45; Duniway, Freedom of the Press in Mass., 144-145.*

It is believed that the last state prosecution for seditious libel in the United States was the case of

*Respublica v. Dennie*, 4 Yeates 267 (Pa., 1805).

Dennie had written in a newspaper:

"A democracy is scarcely tolerable at any period of national history. \* \* \* It has been tried in France, and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. *It is on its trial here, and its issue will be civil war, desolation and anarchy.* No wise man but discerns its imperfections, no good man but shudders at its miseries, no honest man but proclaims its fraud, and no brave man but *draws his sword against its force.* \* \* \*" (Italics Dennie's.)

The Court (Yeates, J.) charged on familiar Blackstonian lines, but left it open for the jury to acquit if they found that Dennie "honestly meant to inform the public mind, and warn them of supposed dangers in society, though the subject may have been treated erroneously." He said also:

"The enlightened advocates of representative republican government pride themselves in the reflection, that the more deeply their

system is examined, the more fully will the judgments of honest men be satisfied, that it is the most conducive to the safety and happiness of a free people."

Dennie was acquitted.

In the New York case of

*People v. Croswell*, 3 Johns. Cases 421  
(1804),

the principle of prosecution for political language *per se* was definitely repudiated. A great Federalist lawyer, Hamilton, and a great Federalist judge, Kent, recognized that American history and theories of government required an ample liberty of the press. They limited it, as this Court has done, only where its exercise is under such circumstances as to lead proximately to substantial danger.

The prosecution was for a personal rather than for a seditious libel, though the subject of the libel and the recent experience under the Sedition Act led to its being treated as for sedition by both Court and counsel. The libel charged was a Federalist newspaper publication to the effect that Jefferson paid Callender (whose trial in Virginia was the most conspicuous case under the Sedition Act) for calling Washington a traitor, robber and perjurer, for calling John Adams a hoary-headed incendiary, and for most grossly slandering the private characters of men whom Jefferson well knew to be virtuous.

On motion for a new trial in the Supreme Court, the Court was equally divided. Lewis, C. J. and Livingston, J. sustained the trial rulings. Kent



and Thompson, JJ. were for a new trial. Alexander Hamilton argued for the defendant in support of the motion. The legislature immediately enacted into law the principles asserted by Hamilton and Justice Kent by Laws of 1805, Chapter 90 (which served as the basis of the constitutional provision adopted in 1821), and judgment was never entered.

Hamilton undertook to work out a defense on common law principles and precedents—arriving at substantially the same position which, as we have shown, the English courts have taken in recent years. It was necessary to repudiate most of the English cases in the eighteenth century and Hamilton frankly did so. He said (p. 465):

“Lord Mansfield showed by his inconsistencies and embarrassment on this subject, that he was supporting a violent paradox. But he did not speak of the errors of that great man, but with the highest veneration for his memory. He would tread lightly over his ashes, and drop a tear of reverence as he passed by.”

Justice Kent adopted Hamilton's contention that the eighteenth century decisions were unsound. He held (1) that whether a writing is seditious libel depends upon whether the writer's *intention* was malicious and seditious *and upon the tendency of the publication to disturb the peace, admitting extrinsic circumstances as bearing upon tendency*; (2) that truth is evidence, not necessarily conclusive, of good intent; (3) that intent and tendency are for the jury. The fact that all three of these propositions represent a departure from Black-

stonian principles by a great and conservative American jurist is noteworthy; of direct bearing upon the present appeal is the discussion by Hamilton and Justice Kent of the first of these principles.

Hamilton said in his argument on the first proposition (pp. 354-355) :

"Texts taken from the holy scriptures and scattered among the people, may, in certain times, and under certain circumstances, become libellous, nay, treasonable. These texts are, then, innocent, libellous, or treasonable, according to the time and intent; and surely the time, manner, and intent are matters of fact for a jury.

*The law cannot adjudge a paper to be a libel, until a jury have found the circumstances connected with the publication."*

Justice Kent said (p. 364) :

*"The simple act of publication, which was all that was left to the jury, in the present case, was not, in itself, criminal. It is the applications to times, persons and circumstances; it is the particular intent and tendency that constitutes the libel. Opinions and acts may be innocent under one set of circumstances, and criminal under another. This application to circumstances, and this particular intent, are as much matters of fact, as the printing and publishing."*

This is exactly the principle for which we contend and which we believe this Court has adopted.

Justice Kent concluded his opinion (390-394) with argument substantially in line with Mad-

ison's, for the construction of liberty of the press in the light of the nature and origin of our government. He said :

"In England they have never taken notice of the press in any parliamentary recognition of the principles of the government, or of the rights of the subject, whereas the people of this country have always classed the freedom of the press among their fundamental rights. This I can easily illustrate by a few examples.

The first American congress, in 1774, in one of their public addresses (*Journals*, vol. 1, p. 57), enumerated five invaluable rights, without which a people cannot be free and happy. \* \* \* One of these rights was the *freedom of the press*, and the importance of this right consisted, as they observed, 'besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.' The next high authority I shall mention, is the Convention of the people of this state, which met in 1788. They declared unanimously (*Journals*, pp. 45, 51, 52, 73, 74), that the freedom of the press was a right which could not be abridged or violated. The same opinion is contained in the amendment to the constitution of the United States, and to which this state was a party. \* \* \*

These multiplied acts and declarations are the highest, the most solemn, and commanding authorities, that the state or the nation can produce. They are generally the acts of

the people themselves, when they came forward in their original character, to change the constitution of the country, and to assert their indubitable rights. And it seems impossible that they could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press, which may not publish anything, true or false, that reflects on the character and administration of public men.

\* \* \* *And if the theory of the prevailing doctrine in England (for even there it is now scarcely anything more than theory), had been strictly put in practice with us, where would have been all those enlightened and manly discussions which prepared and matured the great events of our revolution, or which, in a more recent period, pointed out the weakness and folly of the confederation, and roused the nation to throw it aside, and to erect a better government upon its ruins? They were, no doubt, libels upon the existing establishments, because they tended to defame them, and to expose them to the contempt and hatred of the people. They were, however, libels founded in truth, and dictated by worthy motives."*\* (Italics ours.)

Madison and Hamilton, the principal authors of the *Federalist* and one of them the "Father of the Constitution," and Kent, the foremost jurist of the state courts in his time, thus laid down principles more than a century ago in accord with those ap-

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\* The *Croswell* case was one of the last prosecutions in the nature of seditious libel in any American court. The case has become best known for the proposition that evidence of truth is admissible in cases of ordinary criminal libel—which has been incorporated in the constitutions of more than twenty states. Because of Chancellor Kent's belief in the efficacy of truth as a defense in all libel cases, he conceived that the Sedition Law of 1798 was constitutional.

plied by this Court in the Espionage Act cases. We shall see that the Blackstonian theory of seditious libel which the Federalists enacted in 1798 and which the New York Criminal Anarchy Law seeks to revive, were long ago repudiated by this Court, and repudiated at a time when Chief Justice Marshall presided over its deliberations.

In 1812, the doctrine on which the Federalists had based their argument in support of the Sedition Law of 1798—the doctrine that the crime of seditious libel was cognizable in the courts of the United States without express statute—was wiped out by this Court in the case of:

*United States v. Hudson*, 7 Cranch 32.

That was a case certified by the Circuit Court for the District of Connecticut, which was divided in opinion on a demurrer to an indictment for libel on the President and Congress. The alleged libel was an article in the Connecticut Courant charging that the President and Congress had secretly voted \$2,000,000 as a present to Bonaparte for leave to make a treaty with Spain. The Court disposed of the case on the broad ground that the United States courts can exercise no criminal jurisdiction except under an express statute, saying:

“Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.”

In so holding, this Court repudiated the theory of a federal common law of crimes which had been the premise of the argument in favor of the constitutional power of Congress to pass the Sedition Law of 1798. On the broader question whether there could be such a jurisdiction as for seditious libel, Mr. Justice Johnson said:

“The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation necessarily results to it.”

He expressly stated the doubt which the foregoing extract implies as to

“how far this consideration is applicable to the peculiar character of our constitution.”

The decisions of this Court under the First and Fourteenth Amendments, we submit, answer in principle the question which Mr. Justice Johnson raised. The character of our government is such that language or advocacy with relation to it can be punished, not for its content, but only in circumstances where it has causal connection with a substantive evil, consummated, attempted or likely.

**POINT VI.**

**The New York statute is invalid under general principles of the law of due process.**

This case presents a situation where the right of the state to protect its existence and good order is confronted with a right equally fundamental—the right of free expression with relation to government. Where two rights meet, their harmony requires a balancing of considerations.

The power which the State of New York invoked when it passed the Criminal Anarchy Law is, we suppose, the police power. That legislation accomplishes some relatively small abridgment of rights protected by the Constitution is not conclusive against it if it directly serves a public need and infringes private rights only so far as necessary. "An ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use" (*Noble State Bank v. Haskell*, 219 U. S. 104, 110). But the fact that a claim of public benefit can be made in favor of a statute will not save it if it goes further in restricting constitutional rights than the public need requires. Thus, in sustaining the drastic act of Congress regulating tenancies and rents in the District of Columbia upon the ground of emergent public necessity, this Court gave warning that such regulations, "pressed to a certain height, might amount to a taking without due process of law" (*Bloch v. Hirsh*, 256 U. S. 135, 156). And in *Pennsylvania Coal Co. v. Mahon* (Advance Opin-

ions, Dec. 11, 1922) the indubitable public interest in preventing subsidence of dwellings from coal-mining under them was held, where the safety of the occupants could be provided for by notice, not "sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights" as the statute contemplated. Similarly, in *Adams v. Tanner* (244 U. S. 590, 594), the prevalence of abuses was held sufficient to justify the minor interference with private right involved in regulating, but not the serious interference involved in prohibiting, private employment agencies.

A statute which, like the New York Criminal Anarchy Law, forbids certain advocacies with relation to government irrespective of circumstances is on its face a "palpable invasion of rights secured by the fundamental law"; the data upon which to judge its substantiality of relation to a proper object of the police power are wanting. It presents a case like those in which this Court, undertaking to apply the principle of balance and to weigh the public purpose which the statute is designed to serve against the invasion of constitutional rights which it involves, has condemned the statute as a naked restriction—one whose effect is the mere denial of a right which the Constitution gives:

*Coppage v. Kansas*, 236 U. S. 1,  
*Buchanan v. Warley*, 245 U. S. 60.

In *Coppage v. Kansas* the Court passed upon a statute making it an offense for an employer to attach to employment the condition that the employee should not be a member of a labor union. The statute was held unconstitutional. Mr. Justice Pitney, writing for the Court, concluded that the



statute was related to the public health, safety, morals or welfare only insofar as it tended to level inequalities of fortune between employer and employee by depriving the employer of his liberty and financial independence. He expressed the basis of the decision as follows (pp. 18-19) :

"In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. *But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.*" (Italics ours.)

In *Buchanan v. Warley, supra*, a Louisville ordinance segregating the white and colored races was before the Court. The ordinance forbade a colored person from residing in a block in which the majority of houses were occupied by white persons, and contained similar restrictions upon white persons when the situation was reversed. The Court said, at page 81 :

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, *this aim cannot be accom-*

*plished by laws or ordinances which deny rights created or protected by the Federal Constitution."*

The danger which the Louisville ordinance was designed to avert was by no means fanciful. It was much less remote than any danger to be apprehended, in the absence of particular circumstances, from mere promulgation of the doctrines which New York has defined as "criminal anarchy." The right which the ordinance cut down was not more fundamental than that of free expression with relation to law and government.

In precise accord with these cases is the decision in *Reynolds v. United States*, 98 U. S. 145, 163, 164. Waite, C. J., there adopted the statement of the Virginia Toleration Act of 1786 that any "intrusion" by "the civil magistrate" "into the field of [religious] opinion" is necessarily invalid. There is no right in the state "to restrain the profession or propagation of principles on supposition of their ill tendency." "It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

We do not ask this court to go as far in support of the freedom of political expression as in the *Reynolds* case it went in stating the right of religious opinion and expression. The state—as this Court in the Espionage Act and related decisions recognized—may protect itself against danger, while it probably has under our constitutional system no right to protect religion as such. But the measure of its right to protect itself is to be determined by a balancing of the right against the citizen's right to express himself upon matters of

government. The state may, in a word, protect itself against danger of forcible overthrow or breach of the peace, and may punish speech the circumstances of whose utterance are such as to involve a causal relation with substantive evil, consummated, attempted or likely. But a statute which takes no account of circumstances fails, and fails almost as matter of definition, when put to the basic balancing test. For such a statute may be applied and in the instant case was applied to a situation involving no element of public danger. In its relation to such a situation the statute is a mere invasion of an express constitutional right.

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The conclusion to which we have come is, we believe, a sound one alike when tested by the decisions of this Court upon the instant question; by the principles of the modern law of England; by the history of the subject; and by the general principles of the law of due process and of the Constitution.

The right of free expression with relation to government is not conditioned upon the wisdom or moderation of its exercise. As Professor Freund has declared, and as the history of the right in our constitutional system (Point IV, *supra*) confirms, that right would be nugatory if it had to stop short of questioning the fundamental institutions of government and of suggesting drastic forms of collective action. The New York Criminal Anarchy Law rests upon the theory of a people subject, not sovereign, and not to be trusted—the theory of the older common law of seditious libel

which even in England has become obsolete. It was the theory of a system which feared, and had reason to fear, the possible revolutionary tendency of extremist doctrines.

In our system, on the other hand, a broad liberty of political expression, except in circumstances of particular danger, is not a menace, but a guarantee. For public opinion is our final authority, and public opinion, to be sound, must take account of every doctrine and advocacy at large in the community, not merely of selected premises. Faith in the ultimate rightness of the people is as cardinal an article as fear of their hasty impulses. The soundness of our institutions is ample security against the general spread of disaffection. It is both safe and beneficial to tolerate disaffection to the point where it actually and proximately endangers the safety of individuals or the public peace.

The right of free expression, more than any other, lies at the base of government by the people. Before that right can be impaired a very compelling public necessity indeed must be shown. The penalization *per se* of doctrine such as the defendant was concerned with is not a means reasonably necessary to the preservation of the public peace and good order, or to the accomplishment of any other end beneficial to the public. It is a palpable invasion of rights secured by the fundamental law. It cuts at the very root of free government. To speak of freedom of political communication of any character as in itself a danger to free government is a contradiction in terms, because if that freedom be curtailed, the democratic processes by which free government is secured will be impaired. The impairment of those processes is harm actual and

present. Harm speculative and remote cannot outweigh it. Yet such is the theory of the statute before the Court.

Majorities, in their natural abhorrence of particular advocacies, are apt to attempt unduly to curtail them. The constitutional limitations upon such curtailment have the same quality and purpose as the other constitutional limitations in our system of checks and balances. All of them have primary reference to the dangers of arbitrary and unthinking action by majorities or dominant parties (*Federalist*, Nos. 48, 51 and 78).<sup>\*</sup> Madison wrote to Jefferson in 1788 (*Documentary History of the Constitution*, Vol. V, p. 88) :

“Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. \* \* \* Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince.”

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<sup>\*</sup> President Taft summarized this feeling of the founders of our government in his Message of August 15, 1911, upon the proposal to admit Oklahoma to the Union with a constitutional provision for the recall of judges: “Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority. \* \* \* In order to maintain the rights of the minority and the individual and to preserve our constitutional balance we must have judges with courage to decide against the majority when justice and law require.”

The constitutional checks upon interference by the states with rights of their citizens inherent in the nature of free government (see *Twining v. New Jersey*, 211 U. S. 78, 99, 102, and cases there cited) were given federal protection by the Fourteenth Amendment.

**Since the statute is unconstitutional, the conviction of the plaintiff-in-error should be reversed and the indictment dismissed.**

April 9, 1923.

Respectfully submitted,

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*Argued by*  
JOHN CALDWELL MYERS.

# Supreme Court of the United States,

OCTOBER TERM, 1922.

BENJAMIN GITLOW, Plaintiff-in-error,  <i>against</i>  THE PEOPLE OF THE STATE OF New York, Defendant-in-error.	}	No. 770.
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## BRIEF FOR DEFENDANT-IN-ERROR.

### Statement.

This is a writ of error to review a judgment of the Court of Appeals of the State of New York, affirming a judgment convicting the plaintiff-in-error of the crime of criminal anarchy (New York Penal Law, §§160, 161, subds. 1 and 2).

On February 11th, 1920, the plaintiff-in-error was convicted of the said crime in the New York Supreme Court, County of New York, Trial Term, Part I, after a trial before Mr. Justice Weeks and a jury, and judgment was pronounced whereby the defendant was sentenced to State Prison for not less than five years, nor more than ten years.

On April 1st, 1921, the Appellate Division of the Supreme Court of New York, First Department, rendered a judgment unanimously affirming the judgment of conviction (*People v. Gitlow*, 195 App. Div. 773).

On July 13th, 1922, the Court of Appeals of the State of New York rendered a judgment (two of the seven judges dissenting), affirming the judgment of the Appellate Division, (*People v. Gitlow*, 234 N. Y. 132).

(The two judges who dissented did not take the view that the statute was unconstitutional, but were of the opinion that the manifesto forming the basis of the prosecution did not constitute a violation of the statute).

The prosecution is based upon a publication made in the July 5th, 1919, issue of "The Revolutionary Age".

The plaintiff-in-error claims that the judgment of conviction should be reversed on the ground that the statute upon which the prosecution is based is violative of the due process clause of the Fourteenth Amendment.

## **The Statute.**

The Penal Law provides:

### **"§160. Criminal anarchy defined.**

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

### **"§161. Advocacy of criminal anarchy.**

Any person who:

1. By word of mouth or writing advocates, advises, or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the pro-

priety of the doctrines of criminal anarchy;  
or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine,

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

The indictment in the case at bar is drawn under §160 and subdivisions 1 and 2 of §161.



### **The Facts.**

The facts are simple. The indictment found against the plaintiff-in-error was based upon his advocacy of the doctrines expressed and promulgated in the so-called "Left Wing Manifesto". This manifesto purported to be the manifesto of the Left Wing Section of the Socialist Party. It was published in the July 5th, 1919, issue of a paper known as The Revolutionary Age.

There was no dispute at the trial concerning the plaintiff-in-error's connection with the publication, nor of his advocacy of the doctrines and sentiments contained in the manifesto. It was conceded that the defendant was the business manager of "The Revolutionary Age"; that he was a member of the National Council of the Left Wing Section of the Socialist Party, which owned and controlled "The Revolutionary Age"; that he had knowledge of the publication of the manifesto and was legally responsible therefor; and that the manifesto was not only published with the plaintiff-in-error's knowledge, but the paper was circulated, sold and distributed with his knowledge and he conducted the negotiations for the printing of the paper and paid for the printing as the business manager and one of the owners (Transcript, p. 171).

While the plaintiff-in-error does not raise, and cannot raise in this Court, the contention that the manifesto in question does not fall within the ban of the New York criminal anarchy statute, a summary of the manifesto will be made an appendix to this brief. The manifesto is set out in full in the indictment (Transcript, pp. 14-48). Copies

of the issue of "The Revolutionary Age" for July 5th, 1919, will be submitted to the Court at the argument, if the Court desire to receive them.

The defendant-in-error has stipulated with the plaintiff-in-error to abridge the printed record by omitting much of the matter that was contained in the printed records used in the Appellate Division of the New York Supreme Court and in the Court of Appeals. The omitted matter will not aid this Court in passing upon the constitutionality of the Statute, which is the only question raised here.

### The Real Question Involved.

At the outset, it may be well to dispose of certain contentions made by the plaintiff-in-error. He contends, in effect, that he has been tried and convicted merely because he entertained certain political beliefs which are contrary to the beliefs entertained by the majority of our citizens—in other words, that he has been convicted of heresy, political heresy, and not for the commission of a crime. It is urged that the New York criminal anarchy statute is void because it places its ban upon doctrine as such; and that what the plaintiff-in-error did was, at most, a political offence, which could not be made punishable as a crime.

These contentions are wholly erroneous. The criminal anarchy statute does not place its ban upon the doctrine defined therein, but upon the *advocacy* of that doctrine. The plaintiff-in-error was not tried for heresy. He was tried and convicted because he *advocated* the doctrine that organized government should be overthrown by force or violence or by some unlawful means, and not because he *believed* in that doctrine. It is wholly immaterial whether the plaintiff-in-error believed or disbelieved in the doctrine which he advocated. Having advocated the prohibited doctrine, he was guilty of a violation of the statute, even if he did not believe in the doctrine. If he had not advocated the doctrine, he would have been guilty of no crime, even if he believed in the truth of the doctrine.

We repeat that the plaintiff-in-error was tried and convicted of the substantive offence of *advocating criminal anarchy*, and was neither tried nor

convicted for entertaining a belief that the doctrine which he advocated was in fact the true doctrine.

The contention that what the plaintiff-in-error has done renders him a mere political offender does not merit serious consideration. Our conception of political action involves the idea of legitimate activities. One who violates the law, or one who does a criminal act in relation to a matter which is the subject of legitimate political action, cannot claim immunity or even special consideration on the theory that his offence is a political and not a criminal one. Our laws recognize no aristocracy in crime. A person who violates a valid penal statute is a criminal—whether the criminal act be done in relation to a political or a non-political activity.

The real question involved on this appeal is not whether the right of free speech may be restricted or abridged, but whether criminal responsibility may be imposed for an abuse of the right of free speech. We shall endeavor to establish the proposition that the statute involved in this case is a legitimate exercise of the State's police power and that it does not violate the due process clause of the Fourteenth Amendment. Opinions may differ as to the wisdom of enacting statutes of this character; but that question is one for the Legislature to determine, and we submit that it cannot be considered on this appeal.

## POINT I.

**An abuse of the right of free speech may be declared a crime.**

The brief for plaintiff-in-error contains a very interesting discussion—much of it historical, much of it philosophical—of the right of free speech. We shall not discuss that question at all. We shall confine our discussion to the power of the State to punish abuses of the right of free speech. We rely upon two propositions: (1) that the State has power to make it a crime to abuse the right of free speech; and (2) that the statute under consideration constitutes a valid exercise of that power.

We take it that the first proposition cannot be disputed. Part of the price which a person pays for the privilege of being protected by a civilized government is that he surrenders his abstract right to complete freedom of speech. He may speak freely, but he is liable to punishment if he says that which is injurious to another or to the public welfare.

The Constitution of the State of New York contains the following provisions:

Article 1, Section 8:

“Every citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”

This does not confer a right upon citizens to say and write whatever they please under all circumstances, with impunity.

The grant of the right of free speech is coupled with the reservation of the right *to hold the citizen liable for his abuse of the right granted*. The right granted to the citizen cannot be separated from the right reserved by the State. In other words, the guaranty of the right of free speech is a conditional one. The condition is that the granted right cannot be abused with impunity.

The liability of the citizen for abusing the right of free speech is not limited to civil responsibility, but extends to criminal responsibility as well. If he says or publishes that which is inimical to the public welfare, he is liable to criminal prosecution.

In short, the Constitution of the State of New York places no restriction upon the power of the Legislature to punish writings or speeches which are injurious to society or an incitement to violence and disorder.

*People v. Most*, 171 N. Y. 423.

*Robertson v. Baldwin*, 165 U. S. 275, 281.

*Schenck v. U. S.*, 249 U. S. 47, 52.

*Frohwerk v. U. S.*, 249 U. S. 204.

We take it that it requires neither argument nor citation of authority to demonstrate that the due process clause of the Fourteenth Amendment is not violated by a State statute which is a reasonable exercise of the police power—that is, by a statute which punishes as an abuse of free speech that which is in fact a punishable abuse.

Our task, then, will be to show that the New York criminal anarchy statute is a valid exercise of the State's police power to punish abuses of the right of free speech.

Before proceeding to a discussion of the validity of the statutes under consideration, we desire to suggest that utterances, so far as the power to punish is concerned, may be divided into three classes :

a. Some utterances are not punishable as such under any circumstances. For example, a man may assert with impunity that the moon is made of green cheese;—although, of course, he may be guilty of disorderly conduct if he makes the assertion loudly and repeatedly in a place of public worship, for instance.

b. Some utterances are punishable only when they are made under such circumstances as to incite the hearers to do that which the law forbids and there is imminent danger that they will bear fruit in actual violations of the law. An example of this class of utterances is found in those prohibited by the Espionage Act.

c. Some utterances are so inherently inimical to the public welfare that they are *per se* abuses of the right of free speech and may be made punishable as such. Among utterances falling within this class are those which constitute criminal libel, for example. It is our contention that this category includes utterances advocating the doctrine that organized government should be overthrown by force, violence or any unlawful means.

## POINT II.

**The New York Criminal Anarchy Statute (New York Penal Law §§160, 161 Subdvs. 1 and 2) is constitutional. It does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.**

We now come to a discussion of the question of whether the New York criminal anarchy statute (Penal Law §§160, 161, Subdvs. 1 and 2) is constitutional. Section 160 defines criminal anarchy as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any executive officials of government, or by any unlawful means."

Section 161 creates the crime of advocating criminal anarchy and prescribes the punishment for that crime. It provides, in Subdivisions 1 and 2, that any person who advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head, or of any executive officials of government, or by any unlawful means, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form containing or advocating, advising or teaching the unlawful doctrine, is guilty of a felony and punishable by imprisonment for not more than ten years or by a fine of not more than \$5,000, or both.



The Appellate Division of the Supreme Court of New York, in its opinion in this case (*People v. Gitlow*, 195 App. Div. 773, 785, 790, 791), construed this statute as making it a crime to advocate, within the State of New York, the overthrow of the Government of the United States, or of any State in the Union, by any means or methods other than constitutional means or methods, and as prohibiting the initial and every other act knowingly committed for the accomplishment of that purpose; and as so construed, held the statute to be constitutional. That Court was of the opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom had no application to the statute under consideration and that, therefore, the statute need not be construed, and should not be construed, as being limited in its application to advocacy of the unlawful doctrine under such circumstances that the apprehended danger is present or immediate. Neither of these points was expressly discussed in either of the majority opinions in the Court of Appeals (*People v. Gitlow*, 234 N. Y. 132), but we may safely assume that they met with the approval of the majority of that Court who voted for the affirmance of the judgment of the Appellate Division.

We stand squarely and flatly on the opinion rendered by the Appellate Division. We accept unreservedly the broad construction given the statute by that Court, and assert with confidence that the statute, as thus construed, is constitutional. We believe that it was competent for the State of New York to make it a crime to advocate the overthrow of organized government by any

means other than the lawful and orderly means of the ballot, and to make the knowing advocacy of the unlawful doctrine a crime of itself irrespective of whether the danger of resulting injury therefrom is imminent or remote. We base this belief upon the fundamental principle that the right of the individual to speak freely does not extend so far as to render him immune from punishment if he says that which is inherently inimical to the public welfare.

In *Turner v. Williams* (194 U. S. 279, 294), this Court, in upholding the constitutionality of a statute providing for the exclusion of aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all governments, said:

“As long as human governments endure, they cannot be denied the power of self-preservation.”

It seems to us to be clear that the statutes under consideration constitute a proper exercise by the Government of the State of New York of its power of self-preservation.

If organized government is to endure, it must have the right to protect itself against any form of extra-parliamentary attack—that is, any form of unlawful attack—upon its existence.

The police power certainly extends to the protection of the State itself, as well as to the citizens of the State. What would an organized government amount to if it lacked the power of self-protection? Of what use would it be to have power to protect the individual, if the government upon which he relies for protection is helpless to protect itself?

The principles justifying the New York criminal anarchy statute were admirably stated in *People v. Most* (171 N. Y. 423), which was a prosecution instituted prior to the enactment of that statute. We quote from that opinion at pages 430-432:

“The Constitution of our state provides that ‘every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.’ (Art. 1, §8.)

While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the legislature may control and the courts may punish the licentiousness of the press. ‘The liberty of the press,’ as Chancellor Kent declared in a celebrated case, ‘consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects governments, magistracy or individuals.’ (*People v. Croswell*, 3 Johns. Cas. 336, 393.) Mr. Justice Story defined the phrase to mean ‘that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace,

or attempt to subvert the government.' (*Story's Commentaries on the Constitution*, §1874.)

The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section from which the above quotation is taken expressly sanctions criminal prosecution for libel.

"It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles, as the authorities uniformly hold. (*People v. Ruggles*, 8 Johns. 290, 297; *People v. Muller*, 96 N. Y. 408; *In re Rapier*, 143 U. S. 110.) It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society or the existence of the government. (*Story on the Const.* §1878; *Cooley on Constitutional Limitations*, 518; *Ordronaux on Constitutional Legislation*, 237; *Tiedman on Police Powers*, §81.)"

*The statute does not place a ban upon doctrine as such.*

One of the points raised in behalf of the plaintiff-in-error is that the criminal anarchy statute

is invalid in that it places a ban upon doctrine as doctrine.

This is a misconception of the purpose and effect of the statute. The ban of the statute is not upon a doctrine, but upon the *advocacy* of a doctrine. The statute does not make *belief* in the prohibited doctrine unlawful. What the statute does and all that it does is to make it unlawful to *advocate* the doctrine that organized government should be overthrown by force, or violence, or any unlawful means.

A person may believe in the false doctrine without violating the law. No doubt, he may even express the opinion that the prohibited doctrine is a true one, without violating the law, provided he expresses his opinion in such a way as not to incite others to practice the doctrine. But the moment he *advocates* the duty, necessity or propriety of practicing the doctrine, he does what the law prohibits; and he is guilty of a crime even if he does not himself believe in the doctrine advocated. If a believer in the doctrine of criminal anarchy translates his belief into action by advocating the practice of the doctrine, he does an overt act—incites others to do that which is unlawful—and thereby commits the crime of advocating the doctrine of criminal anarchy. In that case, however, he is rendered guilty not by his belief in, but by his advocacy of, the doctrine.

To summarize: The punishment is imposed for an *act* and not for a *belief*. When a person advocates the prohibited doctrine, he does an act which the statute says is unlawful. If he believes without acting—that is, without advocating—he does nothing unlawful. But if he acts—advocates the prohibited doctrine—he violates the statute,

whether he believes or disbelieves in the doctrine advocated.

*Necessity of imminent danger.*

Perhaps the chief point relied upon by the plaintiff-in-error is that the criminal anarchy statute is unconstitutional because it takes no account of circumstances. It is argued that liberty of expression may be restrained only in circumstances where its exercise bears a causal relation to some substantive evil consummated, attempted or likely.

The position of the plaintiff-in-error seems to be, to state it bluntly and tersely, that the Fourteenth Amendment to the Federal Constitution gives him the right to advocate the overthrow of the government of the State of New York by force or violence or such other unlawful means as he may choose, and that the state government is without power to take any steps to protect itself until such time as militant steps are taken to accomplish the actual overthrow of the government. In other words, the plaintiff-in-error claims that he is entitled to the protection of the Constitution of the United States in his plans to overthrow organized government in one of the States of the Union until his plans have reached the point where there is imminent danger that they will be executed.

It seems to us that the mere statement of the proposition demonstrates its falsity and absurdity. It is true that some utterances which constitute punishable abuses of the right of free

speech become such only when the natural tendency and reasonably probable effect of the words used are to accomplish the evil which it is the purpose of the statute to guard against, or when the danger to be apprehended is present or imminent. The reason for that rule is that the utterances may be dangerous to the public welfare, or not dangerous, according to the time, place or other circumstances at which, or under which, they are made. For example, many things which might be said freely in time of peace would be punishable abuses of free speech if said in time of war.

But, on the other hand, an utterance may constitute an act or be an inseparable part of an act which is inherently inimical to the public welfare. In that case, it is *per se* an abuse of the right of free speech and may be made punishable as such. We submit that an utterance advocating the doctrine of criminal anarchy is of that character.

Criminal anarchy is a dangerous doctrine at *any* time. Its advocacy imperils the life of the state, no matter *when* it is made. The doctrine of criminal anarchy is so inherently dangerous that it is competent for the State to forbid the advocacy of that doctrine absolutely, without regard to whether there is imminent danger that the advocacy will result in the taking of actual steps to carry out the doctrine advocated.

The existence of some grave emergency, such as a state of war, may be necessary ordinarily to justify a *curtailment* of the right of free speech. But the power to punish such an *abuse* of the right of free speech as advocacy of the doctrine of criminal anarchy may be exercised at any time.

We respectfully submit that it was competent for the Legislature of the State of New York to declare that *under no circumstances* is the doctrine to be advocated that organized government should be overthrown by force, violence or any unlawful means.

It certainly cannot be contended that where a group of persons are deliberately advocating the doctrine that organized government should be overthrown by unlawful means, and are pointing out specifically definite steps for the accomplishment of that purpose, the government against which the action is contemplated can take no steps to protect itself by checking the movement before it has gone too far. It cannot be that the Government is powerless to act until the plotters have perfected their plans and are ready to strike the fatal blow. If the Government were bound to delay its action until the arrival of the time for the striking of the blow, it might then be too late, and the Government might perish because of its failure to take seasonable protective measures. The time to kill a snake is when it is young.

In the opinion in this case in the Appellate Division (195 App. Div. 773, 790, 791, 792), Mr. Justice Laughlin made the following admirable statement of the law on this subject:

“So zealously do the courts uphold the constitutional provisions relating to the freedom of speech and of the press and to personal liberty, that they construe legislation designed to prevent the abuse of those rights so as to prohibit only what is essential to prevent the abuse at which the statutes are aimed (*State v. Fox, supra* [71 Wash. 185; 236 U. S. 273]); and the courts in construing such



statutes have in some instances said that the danger to be apprehended from a doctrine, the advocacy of which is lawfully and constitutionally forbidden, must be present or immediate (*Schenck v. United States*, supra, [249 U. S. 47]); *Masses Pub. Co. v. Patten*, 244 Fed. Rep. 535; *revd.*, 246 id. 24; *Colyer v. Skeffington*, 265 id. 17); and in other decisions it is stated that a question of proximity and degree is involved, and that the 'natural tendency and reasonably probable' effect of the words used must be to accomplish the evil which it is the purpose of the statute to guard against. (*Debs v. United States*, 249 U. S. 211; *Commonwealth v. Peaslee*, 177 Mass. 267; *Abrams v. United States*, 250 U. S. 616, dissenting opinion by Mr. Justice Holmes at p. 627; *Schaefer v. United States*, 251 id. 466; *Pierce v. United States*, 252 id. 239.) I am of opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here. The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown, and all public and private property expropriated and nationalized and administered for a time through a proletarian dictatorship and thereafter, in some manner not very definitely disclosed, administered by and for the entire proletariat. I cannot subscribe to the doctrine that it is not competent for the Legislature to forbid the advocacy of such a doctrine designed and

intended to overthrow government in this manner, until it can be shown that there is a present or immediate danger that it will be successful, for such legislation would afford no adequate protection against the apprehended danger, because it is evident that the organization of the proletariat as advised and urged, and the spread of the pernicious doctrine, are to be effected in the main secretly; for we are not informed who is to determine when the time for massed strikes will be ripe or who is to call them, and it is evident that a law so limited might only become effective simultaneously with the overthrow of government, when there would be neither prosecuting officers nor courts for the prosecution and punishment of the crimes. In so far, therefore, as it is competent for the Legislature to enact laws to prevent the overthrow of government by unauthorized means, I am of opinion that the initial and every other act knowingly committed for the accomplishment of that purpose may be forbidden and declared to be a crime. We must assume that the Legislature deemed that, unless the advocacy of such a doctrine was prohibited, there was danger that sooner or later the government might be overthrown thereby. That, I think, was sufficient to warrant the enactment of the statute. I know of no right on the part of the aliens who are members of the Left Wing and here merely by sufferance of our government, to advocate the overthrow of our constitutional form of government by unlawful means; and surely naturalized citizens who have sworn to uphold the Constitution have no right to advocate its overthrow otherwise than through the ballot box and as provided for its amendment, nor have native-born citizens of alien parentage, such as the appellant is, or any other citizen, such right, and they should not be heard to invoke the protection of the Constitution against their

prosecution for acts, deliberately performed, calculated and intended to overthrow and nullify it by unauthorized means. (See *State v. Gilbert*, supra [141 Minn. 263; 254 U. S. 325].) The doctrine's advocates are not harmless. They are a menace, and it behooves Americans to be on their guard to meet and combat the movement, which, if permitted to progress as contemplated, may undermine and endanger our cherished institutions of liberty and equality. But if immigration is properly supervised and restricted and the people become aroused to the danger to be apprehended from the propaganda of class prejudice and hatred—by a very small minority mostly of foreign birth, which has for its object not only the overthrow of government but the destruction of civilization and all the innumerable benefits it has brought to mankind—there can be no doubt but that the God-fearing, liberty-loving Americans both in the urban and rural communities, who appreciate the equal opportunities for all for bettering their status and for advancement afforded by our constitutional form of government, under which the majority rule, and have made and are making sacrifices to improve their condition and that of their families, and to accumulate property for themselves and those who come after them, will see to it that these pernicious doctrines are not permitted to take root in America. Since it is competent for the Legislature to enact laws for the preservation of the State and Nation, the laws required for that purpose rest in the legislative discretion, and if they are reasonably adapted to that end and are based on danger reasonable to be apprehended, even though not present or immediate, they may not be annulled by the courts either on the theory that it would be wiser to leave it to the people to meet the pernicious doctrines by argument, or that

they unnecessarily restrict the freedom of speech or of the press or of personal liberty. The Legislature within its authority has spoken for the People, and it is the duty of the courts to enforce the law."

In *Ex parte Bollman* (8 U. S. [4 Cranch] 74, 126), this Court said per Marshall, C. J.:

"Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation, by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe, that punishment, in such cases, should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

We do not advance a novel doctrine when we assert that an utterance may be so inherently inimical to the public welfare as to be *per se* a punishable abuse of free speech. Several instances of utterances falling within that class suggest themselves readily. Perhaps the most obvious one is that of criminal libel. A malicious libel which tends to expose the person concerning whom it is published to contempt, disgrace or obloquy is indictable as a crime. Criminal libel is punishable, not because it inflicts an injury, but because it may provoke a breach of the peace. So criminal anarchy may be punished because its advocacy operates of itself to imperil the very existence of the State—of organized government. The danger of a breach of the peace resulting from criminal libel need not be imminent. Nor need the danger of overthrow of organized government resulting from the advocacy of criminal anarchy be imminent.

Perjury affords another example of an utterance which is *per se* an abuse of free speech. If a sworn witness testifies falsely as to a material fact in issue, he may be prosecuted and punished irrespective of whether the false testimony given by him influences the verdict.

Some statutes (*e. g.*, N. Y. Penal Law §764, subd. 4) make it a crime to electioneer on Election Day within a specified distance of a polling place. Of course, electioneering usually involves the use of speech. It is a crime to do the prohibited act even if it does not influence the votes of the electors who are approached by the offender.

If we concede, for the sake of argument, that the proper construction of the New York criminal

anarchy statute is that it is applicable only to utterances made under certain circumstances,—that it is applicable only where there is imminent danger that concrete substantive injury will result from the advocacy of the prohibited doctrine,—we nevertheless submit that the manifesto, for the publication of which the plaintiff-in-error has been convicted, constitutes a violation of the statute as thus construed.

The manifesto advocates *the conquest and destruction of the State*, and after that has been accomplished, the temporary establishment of a dictatorship of the proletariat, which in turn is to be succeeded ultimately by a so-called government of production and not of persons,—by the “full and free social and individual autonomy of the communist order”. Mass action finding expression in a general strike is the means advocated for the overthrow, conquest and destruction of the existing organized government. The manifesto made it plain that it is proposed not merely to capture what is termed the bourgeois state, but to conquer and destroy it (Transcript, pp. 103-111, 123, 125, 129-136).

It is apparent, from an examination of the manifesto, that the intent was to incite the readers to use unlawful means to bring about the conquest and destruction of the existing government, and to do this *forthwith*. It is clear that the manifesto contemplated action immediately or in the near future.

The imminence of the danger that unlawful action will result from advocacy of the doctrine of criminal anarchy cannot be measured mathematically. “Imminent” does not necessarily mean the next moment.

If A says, "Oh, I think the government should be overthrown by force", but makes no definite suggestion as to when and how, there is no imminent danger. But if he says, "We must overthrow the government by force; let us do this by mass action; now is the time to act"—and points out the form that mass action shall take and the steps that should be taken to conquer and destroy the existing government, *the danger is imminent*.

That the action advocated by the plaintiff-in-error was not in fact taken is not material, and does not prove that the danger was not imminent; it merely shows that the State wisely acted in self-defence before it was too late. In *Schenck v. United States* (249 U. S. 47)—it was held that the circulation of a document for the purpose of obstructing the draft was a violation of the Espionage Act, even though the circular did not succeed in accomplishing the purpose for which it was published and circulated. The principle involved in that decision is applicable to the question under present consideration.

*Restraint upon free expression of political opinion.*

A considerable portion of the brief of plaintiff-in-error is devoted to an attempt to show that the statute under consideration is void because its purpose and effect is to punish, and therefore limit, free discussion of political questions.

It is obvious that there is no merit whatever in this contention.

Undoubtedly, our theory of government demands that the utmost possible freedom shall be

accorded everyone in the expression of political opinions. A person has the right to advocate drastic changes in our form of government, even to the extent of advocating the overthrow of the existing government or the abolition of all organized government, provided he proposes to bring about the desired changes through the action of the electorate by means of the use of the ballot. But the right to express political opinions freely does not extend to or include the right to advocate the overthrow of the existing government or the destruction of organized government by the use of unlawful means.

The doctrine of criminal anarchy is not a political doctrine. If it were, it would find expression in political action, and not in deeds of violence. Under our system of government, political action is action taken in the manner authorized by law for the purpose of affecting government or governmental affairs. Advocacy of the doctrine of criminal anarchy is not political action. Criminal anarchy seeks to make political action impossible—indeed, to do away with the only thing which political action can affect, or upon which it can operate, namely, organized government.

Ours is a popular government. Our government is conducted according to the will of the majority. When the majority, by their vote, decide any political question, the minority must submit to the popular will. Popular government—government chosen by a majority of the people—is one of the greatest gifts from modern civilization to mankind. It is monstrous to say that anyone living under our government has a constitutional right to advocate with impunity the doctrine that a



minority of the people have the right to overthrow our government by unlawful means.

The plaintiff-in-error and his associates in the communistic movement form a small but militant and dangerous minority in this country. They intend, if possible, to impose their views and their will on the majority. They are determined to substitute rule by the minority—their minority—for rule by the majority, for popular rule. If the majority of the people wanted to abolish organized government, they could do so by their vote. The plaintiff-in-error and his associates know that public sentiment is overwhelmingly opposed to them and their aims, and therefore they seek to accomplish their ends by force, violence or other unlawful means. Clearly, advocacy of measures of that nature is not entitled to constitutional protection as the expression of political opinion.

The distinction between the right to express political opinions and advocacy of the doctrine of criminal anarchy was clearly expressed in the following words by Chief Judge Hiscock of the Court of Appeals in his opinion in this case (*People v. Gitlow*, 234 N. Y. 132, 151):

“Every intelligent person recognizes that one of the great rights secured to the citizens of this country is that of free and fearless discussion of public questions including even the merits and shortcomings of our government. It would be intolerable to think that any attempt could be successfully made to impair such right. But the difference between such forms of discussion and the advocacy of the destruction of government itself by means which are abhorrent to the entire spirit of our institutions is so great that we deem it entirely unnecessary to support at length the

proposition that the Legislature of this state may prohibit the latter without infringing the former."

In *In Re Lithuanian Workers' Literature Soc.* (187 N. Y. Supp. 612, 614-615), the Court said:

"The publication of literature is, of course, an exercise, and perhaps the most common and effective one, of the right of free speech. That right does not embrace the right to advise or encourage attempts to overthrow by force existing government; that is, by what is commonly spoken of as revolutionary methods. Indeed, the Penal Law of this state (Consol. Laws, c. 40), sections 160 and 161, makes advising or teaching 'by word of mouth or writing \* \* \* the duty, necessity or propriety of overthrowing or overturning organized government by force or violence' a felony, punishable by imprisonment from five to ten years, or by a fine of not more than \$5,000, or both. It is not the province of this court in any of its departments to set itself up as a censor of the tastes, social or political, of the people. However repugnant to our minds and consciences the Socialist program may be, we are not to stand in the way of organizations to promote its accomplishment, provided only it is clear that the purpose and intent of those organizations is to seek the accomplishment of that program by lawful methods; that is to say, to change our form of government by amending the Constitution through constitutional methods. It may be remarked, in passing, that whatever may have been or may now be the situation in any other country, there can be in this country no sort of moral excuse even for advocacy of a resort to any other means of effecting such change. By the adoption of the Prohibition and Universal Suffrage Amendments we have recently had very striking examples of the practical

ease and celerity with which our Constitution may be radically amended."

*The wisdom of the statute.*

For the reasons which we have set out hereinbefore, it seems to be clear that the New York criminal anarchy statute is a valid exercise of the State's police power to punish an abuse of the right of free speech.

Opinions may differ as to the wisdom of passing statutes of this character. It may be that from the standpoint of expediency it might be wiser to have a statute which provides for the punishment of the advocacy of criminal anarchy only in those cases where it can be shown that there is imminent danger that concrete substantive injury will result from the advocacy of the unlawful doctrine, on the theory that if our government is to endure we must rely on the good common sense of our citizens to reject false doctrine in respect to government.

But we submit that the question of the wisdom and expediency of the statute was one for the Legislature to determine and that it cannot be considered on this appeal. All that concerns this court is the question whether the statute infringes the Constitution of the United States.

*Fox v. Washington*, 236 U. S. 273, 278.

### POINT III.

**Similar statutes have been upheld in other jurisdictions.**

We have thus far based our argument in support of the constitutionality of the criminal anarchy statute upon principle. It seems to us that the statute is so clearly a justifiable exercise of the State's police power that it may be unnecessary for us to support our argument by the citation of reported cases which have upheld statutes of a similar nature. But since authorities are not wanting, we shall refer to some of them.

#### *California.*

In *People v. Stellik* (203 Pac. 78), the Supreme Court of California, in sustaining the validity of the criminal syndicalism statute of that State, said that the right of free speech does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property, and that the Legislature has power to punish propaganda which has for its purpose the destruction of government or the rights of property which the government was formed to preserve. See, also, *People v. Malley*, 194 Pac. 48, and *Ex Parte McDermott*, 183 Pac. 437, upholding the same statute.

#### *Connecticut.*

In *State v. Sinchuk* (96 Conn. 605, 115 Atl. 33, 20 A. L. R. 1515), the Court upheld the Connecticut statute entitled, "An act concerning sedition." The statute penalized three classes of

publications, including those "which create or foster opposition to organized government." One of the objections which the court considered and rejected as being unsound was that the act "penalized expression for its character regardless of relation or harmful consequence."

#### *Minnesota.*

In *State v. Moilen* (Minn.), 167 N. W. 345, 1 A. L. R. 331, it was held that the Minnesota statute declaring and defining the crime of criminal syndicalism, and prohibiting the advocacy or teaching of sabotage or other methods of terrorism as a means of accomplishing industrial or political aims, is not obnoxious to either the State or the Federal Constitution.

#### *New Jersey.*

In *State v. Quinlan*, 86 N. J. Law 120, 91 Atlantic 111, and *State v. Boyd*, 86 N. J. L. 75, 91 Atlantic 586 (affirmed without opinion in 87 N. J. L. 328,—93 Atlantic 599), the Courts passed upon the validity of the New Jersey statute providing that "any person who shall, in public or private, by speech, writing, printing, or by any other mode or means, advocate, encourage, justify, praise or incite the unlawful burning, destruction of public or private property or advocate, encourage, justify, praise and incite the killing or injuring of any class or body of persons or of any individual, shall be guilty of a High Misdemeanor."

In each of the New Jersey cases just cited, the validity of the statutes was upheld as against the objection that it violated the State Constitution in that it restrained and abridged liberty of speech.

In *State v. Boyd*, 86 N. J. L. 75, 91 Atlantic 586, the Court said:

"The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and breaches of the public peace, is an abuse of the right of free speech, for which, by the very constitutional language invoked, the utterer is responsible."

*Washington.*

In *State v. Fox* (71 Wash. 185, 127 Pacific 1111, affd. 236 U. S. 273) it was held that the Washington statute making it a criminal offense to edit or publish an article "advocating, encouraging, or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disregard for law or for any Court or Courts of Justice," is not violative of the constitutional provisions relating to the freedom of the press.

In *State v. Hennessy* (114 Wash. 351, 195 Pac. 211), the Supreme Court of Washington upheld the validity of a statute of that State commonly known as the "Criminal Syndicalism" statute (L. 1919, p. 518). That statute made it a felony (1) to "advocate, advise, teach or justify crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change," or (2) to "print, publish, edit, issue or knowingly sell, circulate, distribute or display, any book, pamphlet,

paper, handbook, document, or written or printed matter of any form, advocating, advising, teaching or justifying crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change."

In the *Hennessey* case, it was held that the "Criminal Syndicalism" statute was not unconstitutional as abridging freedom of speech. It was also held that the fact that treason is defined in the Federal Constitution does not deprive the State Legislature of the power to enact a statute which is intended to prevent the teaching of crime, sedition, violence or intimidation as a means of overcoming or destroying the present social order.

#### *Oregon.*

In *State v. Laundry* (204 Pac. 958; rehearing denied in 206 Pac. 290), the Supreme Court of Oregon held that no constitutional right, federal or state, was violated by the Syndicalism Act of that State.

(We may point out here that the decision construing the first Washington statute—*State v. Fox, supra*—was rendered in 1912, and that the decisions construing the New Jersey Statute—*State v. Quinlan* and *State v. Boyd, supra*—were rendered in June, 1914, and July, 1914, respectively. We point this out for the purpose of showing that the Washington and New Jersey statutes, as well as the New York statutes under consideration, were passed prior to the commencement of the Great War.)

*New Mexico.*

In *State v. Diamond* (202 Pac. 988, 20 A. L. R. 1527), the Supreme Court of New Mexico held that a State statute prohibiting acts which have for their object the destruction of organized government was unconstitutional as violative of the right of free speech guaranteed by the State Constitution. That statute, however, provided that it should be unlawful for any person or persons to commit or perform or to cause to permit or to be performed "*any act of any kind whatsoever* which has for its purpose or aim the destruction of organized government, federal, state or municipal, or to do or cause to be done any act which is antagonistic to or in opposition to such government, or incite or attempt to incite revolution or opposition to such organized government". The basis of the court's decision was that the offences enumerated in the statute were not confined to acts of violence or force or other unlawful things, but included all acts, peaceful or otherwise, which had for their object the destruction of organized government by acts antagonistic to or in opposition to such organized government. The Court pointed out that under the terms of the statute no distinction was made between the man who advocates a change in the form of our government by constitutional means, or advocates the abandonment of organized government by peaceful methods, and the man who advocates the overthrow of our government by armed revolution, or other form of force or violence.

The New York statute is free from the vice of the New Mexico statute.



### **In Conclusion.**

We respectfully submit that the New York criminal anarchy statute (New York Penal Law, §§160, 161, subds. 1 and 2) is constitutional and does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The judgment convicting the plaintiff-in-error of the crime of criminal anarchy should be affirmed.

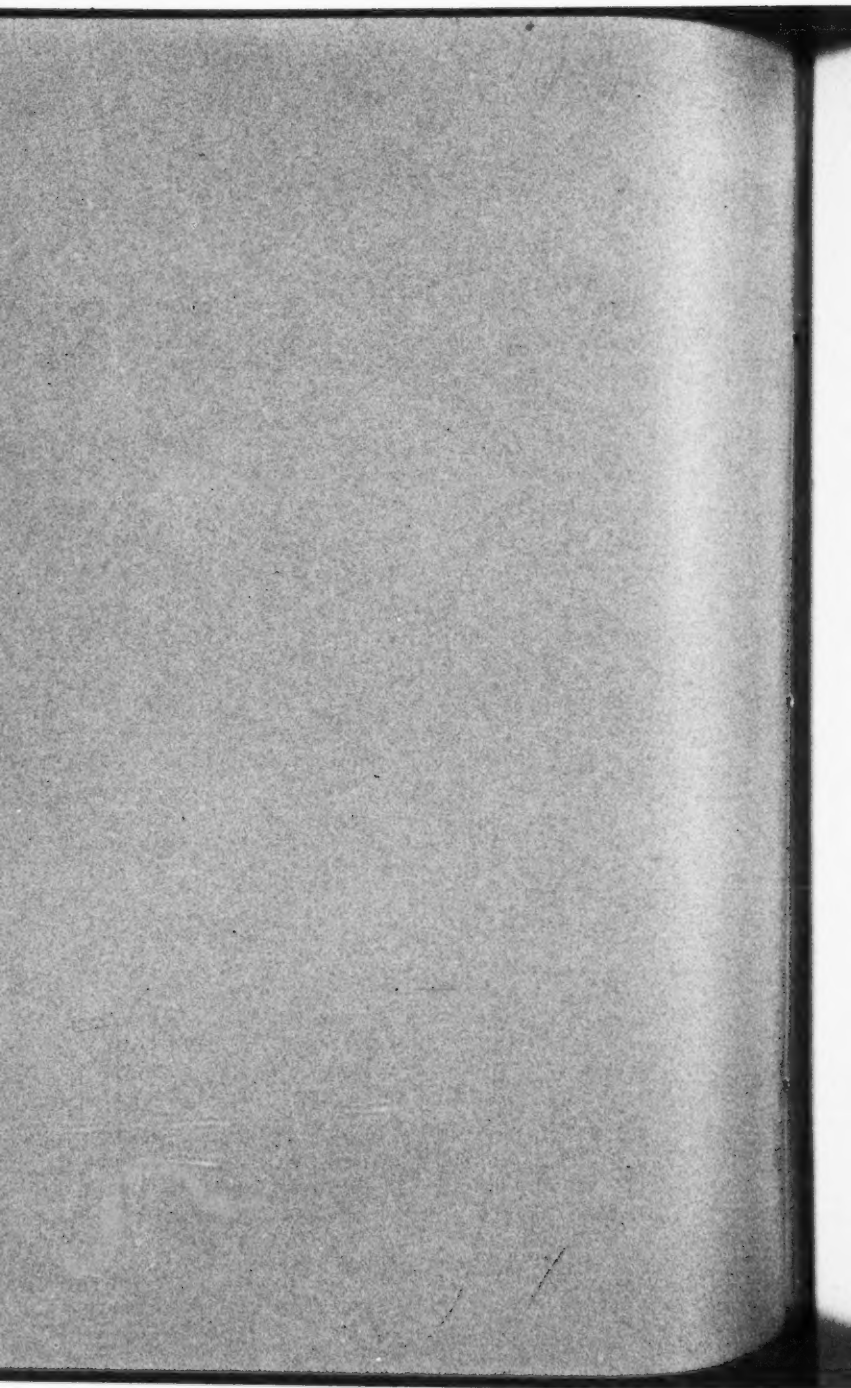
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March, 1923.



## APPENDIX.

The following is a summary or synopsis of the most important parts of the Left Wing Manifesto, which was published in *The Revolutionary Age* of July 5th, 1919, and which affords the basis for the indictment.

In the very beginning of the article on page 6 of "The Revolutionary Age" there is the announcement that the world is in crisis; that socialism itself is in crisis; that communist socialism is developing, and that the struggle between capitalism and communist socialism is now (this means the present time) the fundamental problem of international politics. This may be seen from the following:

"The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. Out of its vitals is developing a new social order, the system of Communist Socialism; and the struggle between this new social order and the old is now the fundamental problem of international politics.

"The predatory 'war for democracy' dominated the world. But now it is the revolutionary proletariat in action that dominates, conquering power in some nations, mobilizing to conquer powers in others, and calling upon the proletariat of all nations to prepare for the final struggle against Capitalism.

"But Socialism itself is in crisis. Events are revolutionizing Capitalism *and Socialism*—an indication that this is the historic epoch of the proletarian revolution. Imperialism is the final stage of Capitalism; and Imperialism means sterner reaction and new wars

of conquest—UNLESS the revolutionary proletariat acts for Socialism. Capitalism cannot reform itself; it cannot be reformed. Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. There can be only the Socialism which unites the proletariat of the WHOLE WORLD in the general struggle against the desperately destructive Imperialisms—the Imperialisms which array themselves as a single force against the ONSWEEPING PROLETARIAN REVOLUTION.”

There must be new wars unless the revolutionary socialist succeeds in his design:

“New problems of power must necessarily arise, producing new antagonisms, new wars of aggression and conquest—unless the revolutionary proletariat CONQUERS in the struggle for Socialism.”

Under the subtitle “The Collapse of the International” in column 3, pages 6, the manifesto clearly suggests that it is the duty of revolutionary socialists to begin a civil war in every country that dared to go to war with any other country; and that the socialists who voted war credits to the nations that went to war in 1914 betrayed the cause of socialism and repudiated the resolution adopted by the Socialist International Congress of Basle that had threatened the governments with Parisian communes in the event any of them declared war upon any other nation. The statement is also made that during a war is the precise time for the proletariat to conquer power. This may be seen from the following, which is quoted from the manifesto:

# “THE COLLAPSE OF THE INTERNATIONAL

In 1912, at the time of the first Balkan war, Europe was on the verge of a general imperialistic war. A Socialist International Congress was convened at Basle to act on the impending crisis. The resolutions adopted *stigmatized the coming war AS IMPERIALISTIC AND AS UNJUSTIFIABLE ON ANY pretext of national interest.* The Basle resolution declared:

1. That the war would create an economic and political crisis; 2. That the workers would look upon participation in the war as a crime, which would arouse ‘indignation and revulsion’ among the masses; 3. That the crisis and the psychological condition of the workers would create a situation that Socialists should use ‘to rouse the masses and hasten the downfall of Capitalism’; 4. That the governments ‘fear a proletarian revolution’ and should remember the Paris Commune and the revolution in Russia in 1905, that is, a civil war.

The Basle resolution indicted the coming war as imperialistic, a war necessarily to be opposed by Socialism, which would use the opportunity of war to wage the revolutionary struggle against Capitalism. The policy of Socialism was comprised in the struggle to transform the imperialistic war into a civil war of the oppressed against the oppressors, and for Socialism.

The war that came in 1914 was the same imperialistic war that might have come in 1912, or at the time of the Agadir crisis. But, upon the declaration of war, *the dominant Socialism, contrary to the Basle resolution, accepted and justified the war.*

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The dominant Socialism favored the war; a small minority adopted a policy of petty bourgeois pacifism; and only the LEFT WING GROUPS adhered to the policy of revolutionary Socialism.

The Basle Manifesto simply required opposition to the war and the fight to develop out of its circumstances the revolutionary struggle of the proletariat against the war and Capitalism.

The class struggle comes to a climax during war. National struggles are a form of expression of the class struggle, whether they are revolutionary wars for liberation or imperialistic wars for spoilation. It is precisely during a war that material conditions provide the opportunity for waging the class struggle to a conclusion for the conquest of power."

Moderate socialists are condemned because they abandoned militant revolutionary tactics:

#### "MODERATE SOCIALISM.

The Socialism which developed as an organized movement after the collapse of the revolutionary First International was moderate, petty bourgeois Socialism. It was a Socialism adapting itself to the conditions of national development, abandoning in practice the MILLITANT idea of revolutionizing the old world."

They are also condemned for their peaceful tactics:

"Evading the actual problems of the revolutionary struggle, the dominant Socialism of the Second International developed into a

PEACEFUL movement of organization, of trades union struggles, of co-operation with the middle class, of legislation and bourgeois State Capitalism as means of introducing Socialism."

They are further condemned because they believed in reforms and using the parliaments instead of destroying the state:

"The dominant Socialism expressed this unity, developing a policy of LEGISLATIVE REFORMS and State Capitalism, making the revolutionary class struggle a parliamentary process.

This developing meant, obviously, the abandonment of fundamental Socialism. It meant working on the basis of the BOURGEOIS PARLIAMENTARY STATE, instead of the struggle to DESTROY THAT STATE; it meant the 'co-operation of classes' for State Capitalism, instead of the uncompromising proletarian struggle for Socialism."

The Mensheviki of Russia, whose leader, Kerensky, overthrew the government of the Czar and set up a democratic-republic parliamentary state, and the Social Democrats of Germany, who likewise set up a parliamentary republic, are roundly condemned for their failure to destroy all vestige of the bourgeois parliamentary state; while on the other hand the Bolsheviks; who by revolutionary methods conquered and destroyed Kerensky's democratic republic in Russia, and the Spartacide Communists of Germany, who likewise sought to overthrow the Social Democrats in Germany by similar revolutionary tactics, are held up as the proper ideal for revolutionary socialists:

### "THE PROLETARIAN REVOLUTION.

The dominant Socialism justified its acceptance of the war on the plea that a revolution did not materialize, that the masses abandoned Socialism.

This was conscious subterfuge. When the economic and political crisis did develop potential revolutionary action in the proletariat, the dominant Socialism immediately assumed an attitude AGAINST the revolution. The proletariat was urged NOT to make a revolution. The dominant Socialism united with the capitalist governments to prevent a revolution.

The Russian revolution was the first act of the proletariat against the war and Imperialism. But while the masses made the revolution in Russia, the bourgeois usurped power and organized the regulation bourgeois-parliamentary republic. This was the first stage of the revolution. Against this bourgeois republic organized the forces of the proletarian revolution. Moderate Socialism in Russia, represented by the Mensheviki and the Social-Revolutionists, acted against the proletarian revolution. It united with the Cadets, the party of bourgeois Imperialism, in a coalition government of bourgeois democracy. It placed its faith in the war 'against German militarism,' in national ideals, in parliamentary democracy and the 'co-operation of classes.'

But the proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of 'all powers to the Soviets'—organizing the new transitional state of proletarian dictatorship. Moderate Socialism, even after its theory that a proletarian revolution was impossible had been shattered



by life itself, acted against the proletarian revolution and mobilized the counter-revolutionary forces against the Soviet Republic—assisted by the moderate Socialism of Germany and the Allies.”

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The revolution in Germany decided the controversy. The first revolution was made by the masses against the protest of the dominant moderate Socialism, represented by the Social-Democratic Party. As in Russia, the first stage of the Revolutionary realized a bourgeois parliamentary republic, with power in the hands of the Social-Democratic Party. Against this, bourgeois republic organized a new revolution, the proletarian revolution directed by the Spartacan-Communists. And, precisely as in Russia, *the dominant moderate Socialism opposed the proletarian revolution*, opposed all power to the Soviets, accepted parliamentary democracy and repudiated proletarian dictatorship.”

Moderate Socialism believes in the democratic parliamentary state to introduce socialism; while Revolutionary Socialism rejects the parliamentary state and declares that that state must be destroyed.

“There is, accordingly, a common policy that characterizes moderate Socialism, and that is *its conception of the state*. Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism; accordingly, it conceived the task of the revolution, in Germany and Russia, to be the construction of the democratic parliamentary state, after which the process of introducing Socialism by legislative reform measures could be initiated. Out of this conception of the state developed the counter-revolutionary policy of moderate Socialism.

Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat.

Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletarian dictatorship."

The Socialists of America are condemned as moderates who failed to take advantage of the recent war in which the United States participated and during which revolutionary socialism, according to the Manifesto, had a chance to conquer power:

"The dominant moderate Socialism of the International was equally the Socialism of the American Socialist Party.

The war and the proletarian revolution in Russia provided the opportunity. The Socialist Party, under the impulse of its membership, adopted a MILITANT declaration against the war. But the officials of the party sabotaged this declaration. The *official* policy of the party on the war was a policy of petty bourgeois pacifism.

This policy necessarily developed into a repudiation of the revolutionary Socialist position. When events developed the test of accepting or rejecting the revolutionary implications of the declaration against the war, the party bureaucracy immediately exposed its reactionary policy, by repudiating the

policy of the Russian and German Communists, and refusing affiliation with the Communist International of revolutionary Socialism."

The United States is becoming an autocratic government preparing for aggression and conquest; but it is approaching a crisis in the days to come which modify the immediate task of the revolutionary socialist. It will be noted that they say, "These conditions modify *our* immediate task." American capitalism is declared to be brutally terrorizing the militant proletariat which condition will produce proletariat action against capitalism (the state). Strikes are developing wherein the workers strive to usurp the functions of government. The revolutionary socialists will use these strikes, broaden them, make them militant for a final struggle against the state. Again, "Revolutionary Socialism must use these mass revolts"; "must base itself on the mass struggle"; "our task is to encourage the militant"; "our task is to articulate and organize the proletariat":

#### "PROBLEMS OF AMERICAN SOCIALISM.

Imperialism is dominant in the United States, which is now a world power. It is developing a centralized, autocratic federal government, acquiring the financial and military reserves for aggression and wars of conquest. The war has aggrandized American Capitalism, instead of weakening it as in Europe. But world events will play upon and influence conditions in this country—dynamically, the sweep of revolutionary proletarian ideas; materially, the coming construction of world markets upon the resumption of competition. Now all-mighty and su-

preme, Capitalism in the United States MUST meet crises IN THE DAYS TO COME. These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. American Capitalism is developing *a brutal campaign of terrorism against the militant proletariat*. American Capitalism is utterly incompetent on the problems of reconstruction that press down upon society. Its 'reconstruction' program is simply to develop its power for aggression, to aggrandize itself in the markets of the world.

"These conditions of Imperialism and of multiplied aggression *will necessarily produce proletarian action against Capitalism*. Strikes are developing which verge on revolutionary action, and in which *the suggestion of proletarian dictatorship is apparent*, the striker-worker is trying to usurp functions of municipal government as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being.

\* \* \* \* \*

But there is a more vital tendency,—the tendency of the workers to initiate mass strikes,—strikes which are equally a revolt against the bureaucracy in the unions and against the employers. These strikes WILL constitute the determining FEATURE of proletarian action IN THE DAYS TO COME. REVOLUTIONARY SOCIALISM *MUST* use THESE MASS industrial revolts TO BROADEN THE STRIKE, to make it general and MILITANT; use the strike for PLITICAL OBJECTIVES, and, finally, DEVELOP THE MASS POLITICAL STRIKE AGAINST CAPITALISM AND THE STATE.

Revolutionary Socialism MUST base itself on the mass struggles of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of So-

cialism and the proletarian movement. The mass strikes of the American proletariat PROVIDE THE MATERIAL BASIS OUT OF WHICH TO DEVELOP THE CONCEPTS AND ACTION OF REVOLUTIONARY SOCIALISM.

*OUR* TASK is to encourage the militant mass movements in the A. F. of L. to split the old unions, to break the power of unions which are corrupted by Imperialism and betray the militant proletariat. The A. F. of L., in its dominant expression, is united with Imperialism. A bulwark of reaction,—it must be exposed and its power for evil broken.

*OUR* TASK, moreover, is to articulate and organize the mass of the unorganized industrial proletariat, which *constitutes the basis* for a *militant* Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and *deepen the action* of the militant proletariat *developing reserves for the ultimate conquest of power*.

Imperialism *IS* dominant in the United States. It controls all the factors of social action. Imperialism is uniting all non-proletarian social groups in a brutal state Capitalism for reaction of spoliation. Against this, revolutionary Socialism *MUST MOBILIZE* the mass struggle of the industrial proletariat.

Moderate Socialism is comprising, vacillating, treacherous, because the social elements it depends upon—the *petite bourgeoisie* and the aristocracy of labor—are not a fundamental factor in society; they vacillate between the bourgeois and the proletariat, their social instability produces political instability; and, moreover, they have been seduced by Imperialism and are now united with Imperialism.

Revolutionary Socialism is resolute, uncompromising, revolutionary, because it builds upon a fundamental social factor, the industrial proletariat, which is an actual producing class, expropriated of all property, in whose consciousness the machine process has developed the concepts of industrial unionism and mass action. Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class.”

Revolutionary Socialism does not propose to capture the bourgeois state, but to conquer and destroy it. The bourgeois parliamentary state never can be the basis for the introduction of Socialism:

#### “POLITICAL ACTION.

The class struggle is a political struggle. It is a political struggle in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state.

Revolutionary Socialism *does not* propose to ‘capture’ the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly **REPUDIATES** the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. This state is a bourgeois state, the organ for the coercion of the proletarian by the capitalist: how, then, can it introduce Socialism? As long as the bourgeois parliamentary state prevails, the capi-

talist class can baffle the will of the proletariat, since all the political power, the army and the police, industry and the press, *are* in the hands of the capitalists, whose economic power gives them complete domination. The revolutionary proletariat *MUST* expropriate all these by the conquest of the power of the state, by annihilating the political power of the bourgeoisie, before it can begin the task of introducing Socialism.

Revolutionary Socialism, accordingly, *Proposes* to conquer the power of the state. It proposes to conquer by means of political action,—political action in the revolutionary Marxian sense, which does not simply mean parliamentarism, but the *class action* of the proletariat *IN ANY FORM* having as its objective the conquest of the power of the state.

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But parliamentarism cannot conquer the power of the state for the proletariat. The conquest of the power of the state is an extra-parliamentary act. It is accomplished, not by the legislative representatives of the proletariat, but *BY THE MASS POWER OF THE PROLETARIAT IN ACTION*. The supreme power of the proletariat inheres in the *political mass strike* in using the industrial mass power of the proletariat for political objectives.

Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is the *political mass strike*.

• • • • •

Under the impact of industrial concentration, the proletariat developed its own dynamic tactics—mass action.

Mass action is the proletarian response to the facts of modern industry, and the forms it imposes upon the proletarian class struggle. Mass action starts as the spontaneous activity of unorganized workers massed in the

basic industry; its initial form is the mass strike of the unorganized proletariat.

Mass action is industrial in its origin; but its development imposes upon it a political character, since the more general and conscious mass action becomes the more it antagonizes the bourgeois state, becomes *political* mass action."

At the moment of crisis in capitalism the revolutionary acts to conquer power by mass action—the strike:

"The proletarian revolution comes at the moment of crisis in Capitalism, of a collapse of the old order. Under the impulse of the crisis, the proletariat acts for the conquest of power, by means of mass action. Mass action concentrates and mobilizes the forces of the proletariat, organized and unorganized; it acts equally against the bourgeois state and the conservative organizations of the working class. The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation.

The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat."

The revolutionary must destroy the state and suppress the bourgeoisie:

"The state is an organ of coercion. The bourgeois parliamentary state is the organ



of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat *MUST*, accordingly, *destroy* this state. But the conquest of political power by the proletariat does not immediately end Capitalism, or the power of the capitalists, or immediately socialize industry. It is therefore necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie.*"

The dictatorship of the proletariat must suppress the bourgeoisie; expropriate it politically and economically; repudiate national debts; loot the trust companies and banks:

"Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. The new society organizes as a communistic federation of producers. The proletariat alone counts in the revolution, and in the reconstruction of society on a Communist basis.

The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is this state alone, functioning as a dictatorship of the proletariat, that can realize Socialism.

The tasks of the dictatorship of the proletariat are:

(a) to completely expropriate the bourgeoisie politically, and crush its powers of resistance.

(b) to expropriate the bourgeoisie economically, and introduce the forms of Communist Socialism.

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But this political expropriation proceeds simultaneously with an immediate, if partial, expropriation of the bourgeoisie economically, the scope of these measures being determined by industrial development and the maturity of the proletariat. These measures, at first, include:

(a) Workmen's control of industry, to be exercised by the industrial organizations of the workers, operating by means of the industrial vote.

(b) Expropriation and nationalization of the banks, as a necessary preliminary measure for the complete expropriation of capital.

(c) Expropriation and nationalization of the large (trust) organizations of capital. Expropriation proceeds without compensation, as 'buying out' the capitalists is a repudiation of the tasks of the revolution.

(d) Repudiation of all national debts and the financial obligations of the old system.

(e) The nationalization of foreign trade.

(f) Measures for the socialization of agriculture."

The Communist International represents the revolutionary class struggle and calls the proletariat to the final struggle against the state:

"The Communist International, on the contrary represents a Socialism in complete accord with the revolutionary character of the class struggle. It unites all the consciously revolutionary forces. It wages war equally

against the dominant moderate Socialism and Imperialism—each of which has demonstrated its complete incompetence on the problems that now press down upon the world. The Communist International issues its challenge to the conscious, virile elements of the proletariat, calling them to the *final struggle* against Capitalism on the basis of the revolutionary epoch of Imperialism.”

The acceptance of the Communist International  
“is decisive in our activity”:

“The acceptance of the Communist International means accepting the fundamentals of revolutionary Socialism as decisive in our ACTIVITY.

The Communist International, moreover, issues its call to the subject peoples of the world, crushed under the murderous mastery of Imperialism. The revolt of these colonial and subject peoples is a necessary phase of the world struggle against Capitalist Imperialism; their revolt must unite itself with the struggle of the conscious proletariat in the imperialistic nations. The Communist International, accordingly, offers an organization and a policy that may unify all the revolutionary forces of the world for the conquest of power, and for Socialism.”

Finally, the Manifesto calls all proletarians to the struggle. “The old order is in decay”—“Civilization is in collapse”—The proletariat revolution and the reconstruction of society—the struggle for these—is now indispensable. “This is the message of the Communist International to the workers of the world. THE COMMUNIST INTERNATIONAL CALLS THE PROLETARIAT OF THE WORLD TO THE FINAL STRUGGLE.”

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# Supreme Court of the United States

OCTOBER TERM, 1922.

No. 770.

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BENJAMIN GITLOW,  
*Plaintiff-in-Error,*  
against  
THE PEOPLE OF THE STATE OF  
NEW YORK,  
*Defendants-in-Error.*

## BRIEF FOR THE STATE OF NEW YORK.

CARL SHERMAN,  
*Attorney General, Attorney*  
*for the State of New York.*

✓ W. J. WETHERBEE,  
*Deputy Attorney General,*  
*Of Counsel.*

✓ CLAUDE T. DAWES,  
*Third Deputy Attorney General,*  
*Of Counsel.*



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**Brief of the State of New York in Support of  
the Constitutionality of Sections 160 and  
161 of the Penal Law of the State of New  
York (Chapter 371 of the Laws of 1902).**

## Statement of Facts.

The legislature of the State of New York at its session in the year 1902 passed an act defining criminal anarchy and providing for the punishment of certain acts of criminal anarchy. The law was approved by the Governor and became effective April 3, 1902 (Chapter 371 of the Laws of the State of New York of 1902). That statute is now a part of the Penal Law of the State of New York



and Sections 160 and 161, which are the only ones with which we are concerned, read as follows:

"Sec. 160. *Criminal anarchy defined.*  
Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"Sec. 161. *Advocacy of criminal anarchy.*  
Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

"3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

"4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of per-

sons formed to teach or advocate such doctrine,

"Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

On July 5, 1919 the plaintiff-in-error (hereinafter referred to as the defendant) published and thereafter circulated a publication called "The Revolutionary Age," containing an article entitled "The Left Wing Manifesto" (pp. 171 and 172).

Thereafter and in November, 1919, the defendant was indicted by the grand jury of New York County for having violated the above quoted sections of the Penal Law (fols. 37-149). The text of the published article appears in the indictment (fols. 40-142).

The defendant was duly tried and convicted of such crime by a jury and sentenced to serve not less than five years and not more than ten years in State Prison (fols. 151-156).

From such conviction an appeal was taken to the Appellate Division of the State of New York, First Department, where the conviction was unanimously affirmed (fols. 157-160).

The opinion of the Appellate Division was written by Mr. Justice Laughlin and appears in the record at folios 171-293. Thereafter an appeal

was taken to the Court of Appeals of the State of New York, where the conviction was again affirmed (fols. 295-302).

The prevailing opinion written by Judge Crane appears at folios 305-340; a concurring opinion by Chief Judge Hiscock appears at folios 341-374; a dissenting opinion written by Judge Pound at folios 375-391.

Judges Hogan, McLaughlin and Andrews concurred with the prevailing opinions. Judge Cardozo concurred with the dissenting opinion (fol. 392).

The dissenting opinion was upon the ground that the publication did not actually violate the statute. None of the judges in either the Appellate Division or Court of Appeals arrived at the conclusion that the statute was unconstitutional.

A writ of error was granted by this court (pp. 165-166) and it is on that writ that this case is now before the court.

The assignments of errors (fols. 416-428) are eleven in number. The first five are the only ones involving the question of the constitutionality of the statute and all of them are directed to the same point and are merely motions made in the course of the trial, based on the proposition that the statute under which the defendant was indicted

ed and tried is unconstitutional in that it is in contravention of that clause of the fourteenth amendment of the Constitution of the United States which provides:

“nor shall any State deprive any person of life, liberty or property without due process of law.”

Whether or not the defendant was guilty of violating this statute and whether or not errors were committed on the trial of the action are questions which do not properly concern this office. It is our duty only to uphold the constitutionality of the statute.

In passing, however, it may be said that the defendant can scarcely be said to urge in his brief that he did not violate the statute nor that any errors were committed on the trial. Indeed those questions were settled by the Court of Appeals. Therefore, this brief will be directed entirely to the question of whether or not the statute violates the above quoted clause of the fourteenth amendment.

### **POINT I.**

**Freedom of speech and of the press is subject to control by penal statutes.**

Numerous penal statutes punishing the saying or publishing of forbidden matter have been held constitutional; otherwise no statute forbidding

profanity, obscenity, the advocacy of murder or treason would be constitutional.

*Fox vs. Washington*, 236 U. S. 273.

*Gilbert vs. Minnesota*, 254 U. S. 325.

*Schenck vs. U. S.*, 249 U. S. 47.

## POINT II.

**The limitations on the states contained in the Fourteenth Amendment is only as to rights granted to citizens of the United States by its constitution or statutes.**

*Presser vs. Illinois*, 116 U. S. 252.

At page 266 the court says:

“It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. \* \* \* The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State Law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? *If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred.*” (Italics are ours).

## POINT III.

The first amendment of the Constitution does not, by virtue of the adoption of the Fourteenth Amendment, curtail the rights of the states to limit the freedom of speech and of the press.

*Maxwell vs. Dow*, 176 U. S. 581.

*U. S. vs. Cruikshank*, 92 U. S. 542.

At page 552 the court says:

"The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States."

## POINT IV.

There is no common law right of citizens to free speech other than the English common law.

*Smith vs. Alabama*, 124 U. S. 465.

We quote from page 478:

"There is no common law of the United States, in the sense of a national customary

law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes."

And again on the same page it is said:

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority."

*Robertson vs. Baldwin*, 165 U. S. 275.

Quoting from page 281:

" \* \* \* The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally ex-

pressed. Thus, the freedom of speech and of the press (Art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation."

It is conceded in appellant's brief that under the English common law the defendant would not have been immune from punishment for the publication in question.

This court has held specifically that there is no national common law other than the English common law as expressed in the constitution and its amendments. It follows, therefore, that unless there is some express prohibition on the State of New York it had the constitutional right to pass the statute now being challenged. We have also shown that there is no such prohibition. The first amendment was purely a limitation on the power of Congress and that limitation has not been extended to the States by the fourteenth amendment.

### POINT V.

**Similar legislation has been held constitutional.**

*Fox vs. Washington*, 236 U. S. 273.

*Gilbert vs. Minnesota*, 254 U. S. 325.

The statute in the Fox case was as follows:

"Every person who shall wilfully print, publish, edit, issue, or knowingly circulate,



sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor."

We find nothing in that statute which provides that the "advocating" of certain doctrine must result in actual breach of the peace or that such doctrine must be advocated under circumstances which are likely to occasion breach of the peace yet it was held constitutional.

In the Gilbert case, the statute under discussion was as follows (page 326):

"Sec. 2. Speaking by word of mouth against enlistment unlawful.—It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States or the state of Minnesota.

"Sec. 3. Teaching or advocating by written or printed matters against enlistment unlawful.—It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

This statute clearly was intended to prohibit the teaching or advocating a doctrine as such without limiting it as to time, place or circumstances. This court held the statute constitutional. The dissenting opinion in that case points out clearly the effect of the statute in the following language (we quote from page 334):

"The Minnesota statute was enacted during the World War; but it is not a war measure. The statute is said to have been enacted by the State under its police power to preserve the peace;—but it is in fact an act to prevent teaching that the abolition of war is possible. Unlike the Federal Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, it applies equally whether the United States is at peace or at war. It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances. The restriction imposed relates to the teaching of the doctrine of pacifism and the legislature in effect proscribes it for all times. The statute does not in terms prohibit the teaching of the doctrine. Its prohibition is more specific and is directed against the teaching of certain applications of it. This specification operates, as will be seen, rather to extend, than to limit the scope of the prohibition."

It, therefore, must be assumed that this court arrived at its conclusion in holding the statute constitutional with full understanding of the effect of such decision.

Appellant urges that both in the Fox case and the Gilbert case and in the cases under the Fed-

eral Espionage Act the peculiar circumstances under which the offenses were committed gave rise to the decisions holding the acts constitutional. We cannot subscribe to any such reasoning.

It is familiar doctrine that a statute may be held constitutional in part and unconstitutional in part, but it is a strange doctrine that a statute may be constitutional sometimes and unconstitutional at other times, depending on the state of the public mind or the state of the weather.

## POINT VI.

**The statute in question is a valid exercise of the police power of the state.**

Counsel for defendant on page 20 of his brief points out clearly the reason why the statute in question is a proper limitation by the state upon the right of free speech. He says in speaking of the advocate of doctrines prohibited by the statute:

“His views may be silly, his remedies preposterous. Their mere utterance creates some danger that unthinking members of the community may undertake to act upon them. But he is not to be punished either for their foolishness or for the danger incident to mere utterance—for the danger inherent in the doctrines themselves, as distinct from a danger arising from their utterance in particular circumstances.”

The State of New York learned by tragic experience the "danger that unthinking members of the community may undertake to act upon them."

In the fall of 1901 President McKinley visited the Pan American Exposition at Buffalo. There was no public unrest; there was no state of war; there were no great strikes or riots in progress; there was no reason to apprehend any anarchistic teachings would cause a great public disaster; yet an "unthinking member of the community" did "undertake to act upon them", and the President was murdered, not because the assassin had any personal grievance against him, but simply because he represented organized government.

The People of the State of New York discovered, much to their chagrin, that the real perpetrators of the crime, Emma Goldman and her like, could not be punished, for want of any statute forbidding the teaching of the silly doctrine which caused a silly man to murder the President.

The next session of the legislature of the State of New York passed the act now being attacked. If the act had contained the limitations which it is contended were necessary to make it constitutional; that is, that the propaganda sought to be forbidden must be such as to cause danger of a particular breach of the peace, or a breach of the

peace by some certain person or at a particular time or place or against some certain person or persons, then of course it could not have accomplished the object for which it was passed; that is to prevent the dissemination of a doctrine as such, which working insidiously on a perverted mind would cause another tragedy, perhaps not of the same kind, but nevertheless a tragedy which it is the duty of the state to avoid if possible.

Counsel's statements that he who promulgates such dangerous doctrines, which work upon the minds of "unthinking members of the community" so that they may cause some great public calamity "is not to be punished either for their foolishness or for the danger incident to mere utterance," does not logically follow.

It is the height of folly to punish only the unthinking perpetrators of the crime after it has been committed and let the real criminal, the instigator of the crime who by his "*doctrine qua doctrine*," under the guise of liberty of speech and freedom of the press, has brought about such a state of mind in some of his less well balanced hearers or readers as to make such a crime possible.

Reduced to its simplest terms the statute forbids the advocacy of murder and treason. Surely the state has the right to protect itself, and the

government of which it is a part, from assaults or from the advocacy of assaults intended to overthrow the very constitutions and governments which such advocates attempt to hide behind for protection. Surely the state has a right to pass laws prohibiting doctrines, the necessary result of which has been and is violence and disorder.

### POINT VII.

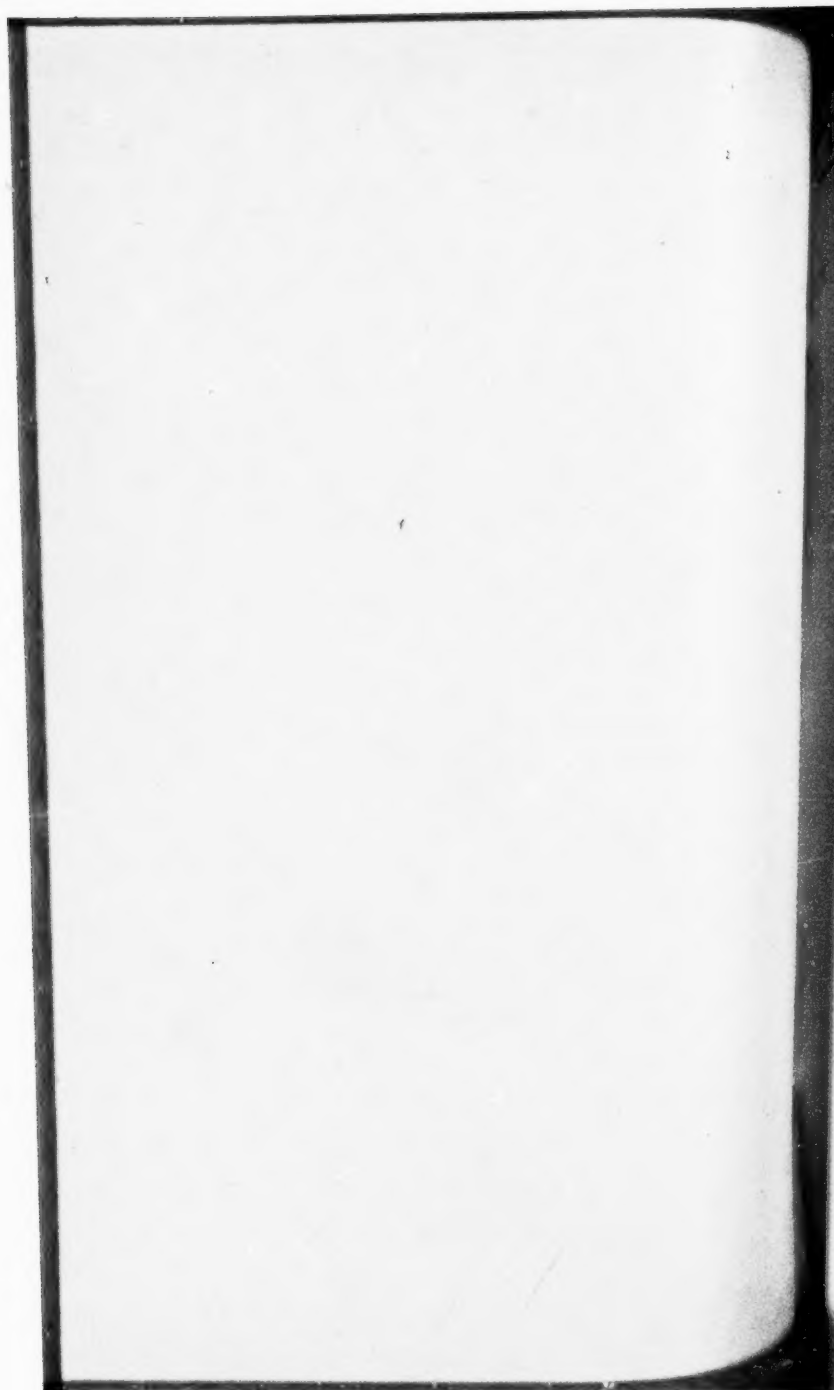
The judgment of this court should uphold the constitutionality of the statute under which the defendant was convicted; and there being no question of the violation of that statute by the defendant and that he had a fair trial, by all the due processes of law, the judgment of conviction should be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 19.—OCTOBER TERM, 1924.

Benjamin Gitlow, Plaintiff in Error,	}	In Error to the Supreme Court of the State of New York.
vs.		
The People of the State of New York.		

[June 8, 1925.]

Mr. Justice SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161.<sup>1</sup> He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. 195 App. Div. 773; 234 N. Y. 132 and 539. The case is here on writ of error to the Supreme Court, to which the record was remitted. 260 U. S. 703.

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

"§ 160. *Criminal anarchy defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"§ 161. *Advocacy of criminal anarchy.* Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating,

<sup>1</sup>Laws of 1909, ch. 88; Consol. Laws, 1909, ch. 40. This statute was originally enacted in 1902. Laws of 1902, ch. 371.



advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means . . . .

"Is guilty of a felony and punishable" by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendants had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that the defendants had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in *The Revolutionary Age*, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the *Revolutionary Age* and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto

and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

No witnesses were offered in behalf of the defendant.

Extracts from the Manifesto are set forth in the margin.<sup>2</sup> Coupled with a review of the rise of Socialism, it condemned

**"The Left Wing Manifesto"**

*"Issued on Authority of the Conference by the  
National Council of the Left Wing.*

"The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. . . . Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. . . . The class struggle is the heart of Socialism. Without strict conformity to the class struggle, in its revolutionary implications, Socialism becomes either sheer Utopianism, or a method of reaction. . . . The dominant Socialism united with the capitalist governments to prevent a revolution. The Russian Revolution was the first act of the proletariat against the war and Imperialism. . . . [The] proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of 'all power to the Soviets,'—organizing the new transitional state of proletarian dictatorship. . . . Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism. . . . Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat. . . . Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletarian dictatorship. . . . Imperialism is dominant in the United States, which is now a world power. . . . The war has aggrandized American Capitalism, instead of weakening it as in Europe. . . . These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. . . . Strikes

<sup>2</sup>Italics are given as in the original, but the paragraphing is omitted.

the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism", based on "the class struggle" and mobilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action", for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat", the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg<sup>3</sup> were cited as instances of a develop-

are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being. . . . These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state. Revolutionary Socialism must base itself on the mass struggles of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of Socialism and the proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism. . . . Our task . . . is to articulate and organize the mass of the unorganized industrial proletariat, which constitutes the basis for a militant Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and deepen the action of the militant proletariat, developing reserves for the ultimate conquest of power. . . . Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class. The class struggle is a political struggle . . . in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state. Revolutionary Socialism does not

<sup>3</sup>There was testimony at the trial that "there was an extended strike at Winnipeg commencing May 15, 1919, during which the production and supply of necessities, transportation, postal and telegraphic communication and fire and sanitary protection were suspended or seriously curtailed."

ment already verging on revolutionary action and suggestive of proletarian dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government"; and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

At the outset of the trial the defendant's counsel objected to the introduction of any evidence under the indictment on the grounds that, as a matter of law, the Manifesto "is not in contravention of the statute," and that "the statute is in contravention of" the due process clause of the Fourteenth Amendment. This objection was denied. They also moved, at the close of the evidence, to dismiss the indictment and direct an acquittal "on

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propose to 'capture' the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly, repudiates the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. . . . It proposes to conquer by means of political action . . . in the revolutionary Marxian sense, which does not simply mean parliamentarism, but the *class action* of the proletariat in any form having as its objective the conquest of the power of the state. . . . Parliamentary action which emphasizes the implacable character of the class struggle is an indispensable means of agitation. . . . But parliamentarism cannot conquer the power of the state for the proletariat. . . . It is accomplished, not by the legislative representatives of the proletariat, but by *the mass power of the proletariat in action*. The supreme power of the proletariat inheres in the *political mass strike*, in using the industrial mass power of the proletariat for political objectives. Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is *the political mass strike*. . . . The power of the proletariat lies fundamentally in its control of the industrial process. The mobilization of this control in action against the bourgeois state and Capitalism means the end of Capitalism, the initial form of the revolutionary mass action that will conquer the power of the state. . . . The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation. The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat. . . . The bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state. . . . It is therefore necessary that the proletariat organize its own state

the grounds stated in the first objection to evidence", and again on the grounds that "the indictment does not charge an offense" and the evidence "does not show an offense." These motions were also denied.

The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose and fair meaning of the Manifesto; that its words must be taken in their ordinary meaning, as they would be understood by people whom it might reach; that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice or advocacy of action, would not constitute the advocacy, advice or teaching of a doctrine

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*for the coercion and suppression of the bourgeoisie. . . .* Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. . . . The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is this state alone, functioning as a dictatorship of the proletariat, that can realize Socialism. . . . While the dictatorship of the proletariat performs its negative task of crushing the old order, it performs the positive task of constructing the new. Together with the government of the proletarian dictatorship, there is developed a new 'government,' which is no longer government in the old sense, since it concerns itself with the management of production and not with the government of persons. Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism,—industrial self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order. . . . It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. The old order is in decay. Civilization is in collapse. The proletarian revolution and the Communist reconstruction of society—the struggle for these—is now indispensable. This is the message of the Communist International to the workers of the world. The Communist International calls the proletariat of the world to the final struggle!"

for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, unless there was a teaching, advising and advocacy of employing such unlawful acts for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did teach, advocate or advise the duty, necessity or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal.

The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" of force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that to constitute guilt the language used or published must be "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness, with the object of overthrowing organized government. These were also denied.

The Appellate Division, after setting forth extracts from the Manifesto and referring to the Left Wing and Communist Programs published in the same issue of the *Revolutionary Age*, said:<sup>4</sup> "It is perfectly plain that the plan and purpose advocated . . . contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, . . . but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. . . . The articles in question are not a discussion of ideas and theories. They advocate

<sup>4</sup>195 App. Div. 773, 782, 790.

a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown . . . ."

The Court of Appeals held that the Manifesto "advocated the overthrow of this government by violence, or by unlawful means."<sup>5</sup> In one of the opinions representing the views of a majority of the court,<sup>6</sup> it was said: "It will be seen . . . that this defendant through the manifesto . . . advocated the destruction of the state and the establishment of the dictatorship of the proletariat. . . . To advocate . . . the commission of this conspiracy or action by mass strike whereby government is crippled, the administration of justice paralyzed, and the health, morals and welfare of a community endangered, and this for the purpose of bringing about a revolution in the state, is to advocate the overthrow of organized government by unlawful means." In the other<sup>7</sup> it was said: "As we read this manifesto . . . we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism" and "in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in specific terms of the use of . . . force or violence. There was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described."

And both the Appellate Division and the Court of Appeals held the statute constitutional.

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<sup>5</sup>Five judges, constituting the majority of the court, agreed in this view. 234 N. Y. 132, 138. And the two judges, constituting the minority—who dissented solely on a question as to the construction of the statute which is not here involved—said in reference to the Manifesto: "Revolution for the purpose of overthrowing the present form and the established political system of the United States government by direct means rather than by constitutional means is therein clearly advocated and defended . . ." p. 154.

<sup>6</sup>Pages 141, 142.

<sup>7</sup>Pages 149, 150.



The specification of the errors relied on relates solely to the specific rulings of the trial court in the matters hereinbefore set out.\* The correctness of the verdict is not questioned, as the case was submitted to the jury. The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, That the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press; and 2nd, That while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circumstances," it unduly restrains this liberty and is therefore unconstitutional.

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the State courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful

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\*Exceptions to all of these rulings had been duly taken.



means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that: "A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. . . ."

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society—the *struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause

of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.<sup>9</sup>

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution, 5th ed., § 1580, p. 634; *Robertson v. Baldwin*, 165 U. S. 275, 281; *Patterson v. Colorado*, 205 U. S. 454, 462; *Fox v. Washington*, 236 U. S. 273, 276; *Schenck v. United States*, 249 U. S. 47, 52; *Frohwerk v. United States*, 249 U. S. 204 206; *Debs v. United States*, 249 U. S. 211, 213; *Schaefer v. United States*, 251 U. S. 466, 474; *Gilbert v. Minnesota*, 254 U. S. 325, 332; *Warren v. United States*, (C. C. A.) 183 Fed. 718, 721. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. *Robertson v. Baldwin*, *supra*, p. 281; *Patterson v. Colorado*, *supra*, p. 462; *Fox v. Washington*, *supra*, p. 277; *Gilbert v. Minnesota*, *supra*, p. 339; *People v. Most*, 171 N. Y. 423, 431; *State v. Holm*, 139 Minn. 267, 275; *State v. Hennessy*, 114 Wash. 351, 359; *State v. Boyd*, 86 N. J. L. 75, 79; *State v. McKee*, 73 Conn. 18, 27. Thus it was held by this Court in the *Fox Case*, that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case*, that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

<sup>9</sup>Compare *Patterson v. Colorado*, 205 U. S. 454, 462; *Twining v. New Jersey*, 211 U. S. 78, 108; *Coppage v. Kansas*, 236 U. S. 1, 17; *Fox v. Washington*, 236 U. S. 273, 276; *Schaefer v. United States*, 251 U. S. 466, 474; *Gilbert v. Minnesota*, 254 U. S. 325, 338; *Meyer v. Nebraska*, 262 U. S. 390, 399; 2 Story On the Constitution, 5th Ed., § 1950, p. 698.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story, (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *State v. Holm, supra*, p. 275. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. *People v. Most, supra*, pp. 431, 432. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. *People v. Lloyd*, 304 Ill. 23, 34. See also, *State v. Tachin*, 92 N. J. L. 269, 274; and *People v. Steelik*, 187 Cal. 361, 375. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. *Turner v. Williams*, 194 U. S. 279, 294. In *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419, it was said: "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler v. Kansas*, 123 U. S. 623, 661. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State

in the public interest." *Great Northern Ry. v. Clara City*, 246 U. S. 434, 439. That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency. In *People v. Lloyd*, *supra*, p. 35, it was aptly said: "Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illus-

trated in *Fox v. Washington*, *supra*, p. 277; *Abrams v. United States*, 250 U. S. 616, 624; *Schaefer v. United States*, *supra*, pp. 479, 480; *Pierce v. United States*, 252 U. S. 239, 250, 251;<sup>10</sup> and *Gilbert v. Minnesota*, *supra*, p. 333. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck v. United States*, *supra*, p. 51; *Debs v. United States*, *supra*, pp. 215, 216. And the general statement in the *Schenck Case* (p. 52) that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was

<sup>10</sup>This reference is to so much of the decision as relates to the conviction under the third count. In considering the effect of the decisions under the Espionage Act of 1917 and the amendment of 1918, the distinction must be kept in mind between indictments under those provisions which specifically punish certain utterances, and those which merely punish specified acts in general terms, without specific reference to the use of language.

manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. *Queen v. Most*, L. R., 7 Q. B. D. 244.

We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant's brief. These are so unlike the present statute, that we think the decisions under them cast no helpful light upon the questions here.

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is

*Affirmed.*

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Mr. Justice HOLMES.

Mr. Justice Brandeis and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat

larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right then I think that the criterion sanctioned by the full Court in *Schenck v. United States*, 249 U. S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent." It is true that in my opinion this criterion was departed from in *Abrams v. United States*, 250 U. S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and *Schaefer v. United States*, 251 U. S. 466, have settled the law. If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

